No. 92-8841-CSY
Status: GRANTED
CAPITAL CASE

Title: Kitrich Powell, Petitioner
v.
Nevada

Docketed:
May 24, 1993

Court: Supreme Court of Nevada

Counsel for petitioner: Pescetta,Michael

Counsel for respondent: Del Papa,Frankie Sue, Seaton,Dan M.

Entry	Date	Note	Proceedings and Orders
1	May 24 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jun 28 1993		Order extending time to file response to petition until July 26, 1993.
6	Jul 26 1993		Brief of respondent Nevada in opposition filed.
5	Aug 5 1993		DISTRIBUTED. September 27, 1993
7	Aug 6 1993	X	Reply brief of petitioner filed.
9	Oct 4 1993		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m.,Wednesday,January 5, 1994. Rule 29 does not apply. **********
10	Nov 5 1993		Joint appendix filed.
11	Nov 15 1993		Brief of petitioner Kitrich Powell filed.
12	Nov 15 1993		Record filed.
		*	Original proceedings Supreme Court of Nevada (2 BOXES)
17	Nov 29 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
13	Dec 6 1993		Brief amicus curiae of Criminal Justice Legal Foundation filed.
14	Dec 13 1993		Brief amicus curiae of United States filed.
15	Dec 14 1993		Brief of respondent Nevada filed.
16	Dec 14 1993		Brief amici curiae of Utah, et al. filed.
18	Dec 29 1993		SET FOR ARGUMENT TUESDAY, FEBRUARY 22, 1994.(3RD CASE).
19	Jan 4 1994		Reply brief of petitioner Kitrich Powell filed.
21	Jan 7 1994		CIRCULATED.
20	Jan 10 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Feb 22 1994		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

92-8841

Supreme Court, U.S.
FILED
MAY 2 1993
ORIGINAL CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ORIGINAL

KITRICH POWELL, Petitioner

v.

THE STATE OF NEVADA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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ISSUE PRESENTED

1. May a state court decline to apply a controlling Fourth Amendment decision of this court to a case pending before it on direct appeal with impunity, in spite of Griffith v. Kentucky.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

KITRICH POWELL, Petitioner

v.

THE STATE OF NEVADA, Respondent

Petition for Writ of Certiorari to

the Supreme Court of Nevada

Petitioner KITRICH POWELL respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nevada affirming his conviction and sentence of death.

OPINION BELOW

The opinion of the Supreme Court of Nevada is published as Powell v. State, 108 Nev. Adv. Opn. No. 148, 838 P.2d 921 (1992). App. 1. The order denying the petition for rehearing is unpublished. App. 12.[1]

[1] There are no parties to this matter other than those named in the caption.

JURISDICTION

The judgment of the Nevada Supreme Court affirming petitioner's conviction and death sentence was entered on September 3, 1992. Petitioner's timely petition for rehearing was denied on February 23, 1993.

Petitioner invokes the jurisdiction of this court under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Powell was convicted of first degree murder and sentenced to death. The facts underlying the conviction are not relevant to the issue presented here. Petitioner was arrested without a warrant on November 3, 1989, a Friday. No probable cause determination was made until November 7, 1989, the following Tuesday. Statements were elicited from petitioner on November 3 and on November 7, 1989.

Admission of the statements elicited during the period of petitioner's detention was objected to on evidentiary grounds at trial and under Nev. Rev. Stats. § 171.178 on appeal. RT 3573; App. Opening Brief at 82-85. On appeal, the Nevada Supreme Court, apparently exercising its power to review plain errors, to review errors of constitutional dimension, and to review errors sua sponte, e.g. Guy v. State, 108 Nev. 710, 839 P.2d 578 (1992); Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718 (1991); Jones v. State, 101 Nev. 573, 580, 707 P.2d 1128 (1985); Nev. Rev. Stats., § 47.040(2); Nev. Sup. Ct. Rules, Rule 250(IV)(I), found that

petitioner's detention was illegal under County of Riverside v. McLaughlin, __ U.S. __, 111 S.Ct 1661 (1991), and that his statements to the police were inadmissible and prejudicial. The court, however, refused to apply McLaughlin, relying on authority predating Griffith v. Kentucky, 479 U.S. 314 (1987). The rule of Griffith, and the court's power and obligation under its own precedents to apply constitutional rules sua sponte, was drawn to the court's attention in the reply of amicus curiae (current counsel of record) to the state's petition for rehearing, which was received by the court but apparently not filed while the petition for rehearing was pending. App. 12 n. 1.

REASONS FOR GRANTING REVIEW

A writ of certiorari should be granted, the judgment should be vacated and the case should be remanded in order to require the Nevada Supreme Court to apply this court's decision in County of Riverside v. McLaughlin, ____ U.S. ___, 111 S.Ct. 1661 (1991) to petitioner's case. This case was before the Nevada Supreme Court on direct appeal at the time McLaughlin was decided, and the court's refusal to apply McLaughlin "conflicts with applicable decisions of this Court." Sup. Ct. Rules, Rule 10.1(c).

In its decision, the Nevada Supreme Court recognized that there was an unjustified delay in petitioner's probable cause determination, and that statements prejudicial to him were elicited during the period of delay:

> "Powell was arrested on Friday, November 3, 1989. A magistrate found probable cause to hold Powell for a preliminary hearing on Tuesday, November 7, 1989. It is unclear from the record whether Powell was present before the magistrate on this day. Powell contends that he was not brought before a magistrate until November 13, 1989. On November 3, 1989, and November 7, 1989, prior to his initial appearance, Powell made statements to the police. These statements, which were presented to the jury, were clearly prejudicial to Powell." 838 P.2d at 924.

The court then recognized that this Court's decision in McLaughlin rendered the delay in conducting a probable cause determination constitutionally impermissible:

> "The McLaughlin case renders NRS 171.178(3) unconstitutional insofar that it permits an initial appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours. Based on McLaughlin, we hold that a suspect must come before a magistrate within forty-eight hours, including non-judicial days, for a probable cause determination. Id. (footnote omitted).

But the court refused to apply McLaughlin:

> "It is important to note that the forty eight hour requirement mandated by McLaughlin does not apply to the case at hand. When case announces a new rule of law, the application of the rule is prospective unless it is a rule of constitutional law; and then it is only applied retroactively under certain circumstances. Gier v. District Court, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990). The factors to be weighed in determining retroactivity are: '(1)the purpose of the rule; (2) the reliance on prior, contrary law; and (3) the effect retroactive application would have on the administration of justice.' Franklin v. State, 98 Nev. 266, 169 n.2, 646 P.2d 543, 545 n.2 (1982) (citing Tehan v. United States, 382 U.S. 406 (1966)).
>
> We conclude that the new rule announced in McLaughlin would not apply retroactively, if only for the monumental negative impact which retroactive application would have on the administration of justice in Nevada. Were McLaughlin to be applied retroactively, untold numbers of prisoners would be set free because they were not brought before a magistrate within forty-eight hours." 838 P.2d at 924, n.1.[2]

The Nevada Supreme Court could not refuse to apply McLaughlin and its refusal to do so violated Griffith v. Kentucky, 479 U.S. 314, 322 (1987): "Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of

[2] The Nevada Supreme Court's subsequent discussion of a purported waiver of the right to timely arraignment is directed only to the violation of the state statutory time limit, not to the constitutional limit recognized in McLaughlin. 838 P.2d at 925. Since the supposed waiver which the court's decision discussed occurred only after the time limit prescribed by McLaughlin had already expired, 838 P.2d at 924, it is not relevant to the constitutional issue posed here.

constitutional adjudication." Whether or not a decision of this court is merely an extension of its precedents or a "clear break" with its previous jurisprudence, fundamental fairness requires that any rule announced be applied, at minimum, to all cases on direct appeal: "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Id. at 328. The Nevada Supreme Court decision in this case is plainly irreconcilable with Griffith, a case decided over six years ago. The Nevada Supreme Court's action violated petitioner's right to due process of law, by depriving him of a protection to which he is indubitably entitled under the federal constitution; it violated his right to equal protection of the laws, by depriving him of a right afforded to others similarly situated in other jurisdictions, whose cases have been decided in conformity with McLaughlin and Griffith; and it directly violated his right under the Fourth Amendment recognized in McLaughlin itself.

In the context of this case, the Nevada Supreme Court's refusal to apply McLaughlin makes it imperative for this court to grant certiorari. Normally, this court's decisions are enforced by the lower state and federal courts: "As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." Id. at 323. But here, the lower court has refused to follow this Court's explicit instructions in Griffith. Furthermore, because McLaughlin is a Fourth Amendment decision, enforcement of this court's rule through federal habeas corpus proceedings may arguably be unavailable, and will clearly be substantially more difficult. See Stone v. Powell, 428 U.S.

465 (1976).

Petitioner does not concede that he would be absolutely barred from raising this issue in collateral proceedings. E.g., id. at 495 n. 37 (Fourth Amendment issues considered in collateral proceedings when state procedures at trial or on appeal not full and fair); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (Fourth Amendment issues considered in context of Sixth Amendment claim); Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (en banc) cert. denied, 434 U.S. 1038 (1978) ("unconscionable breakdown" in state corrective process results in absence of full and fair opportunity to litigate claim). In light of the constantly increasing impediments to obtaining relief in collateral proceedings, however, e.g., Brecht v. Abrahamson, __ U.S. ___, 61 U.S.L.W. 4335, 4340 (1993), petitioner should not be forced to bear the risk and delay of collateral litigation to correct a flagrant violation of an explicit constitutional command. Petitioner submits that summary vacation of the judgment and remand for reconsideration in light of Griffith is necessary to maintain the integrity of the rule of law.[3]

This disposition is also necessary to conserve judicial resources: it will prevent the delay and expense of extended state and federal collateral proceedings; it will not require this Court to expend its own resources in plenary review; it will correct the egregious

[3] The Nevada Supreme Court explicitly found that McLaughlin had been violated and that prejudice resulted from the admission of evidence obtained in violation of McLaughlin. 838 P.2d at 924; App. 4. This court could therefore reverse and remand with directions to reverse the judgment of conviction. The Nevada Supreme Court should, however, be permitted the opportunity to conform its decision to Griffith. Compare Yates v. Aiken, 484 U.S. 211 (1987), with Yates v. Evatt, 500 U.S. ___, 111 S.Ct. 1884 (1991).

constitutional error committed here; and it will enforce upon the lower court the duty to apply existing constitutional standards, which is a crucial component of this court's current jurisprudence. Further, the Nevada Supreme Court's decision here stated its intention to apply McLaughlin only prospectively. 838 P.2d at 924 n. 1; App. 4. In the absence of corrective action by this Court it will continue to ignore the constitutional rule which was recognized in that case, and will continue to refuse to apply it to cases not final at the time McLaughlin was decided. The court's position as to all such cases, which affects both the integrity of the federal constitutional right itself and the cost and delay associated with enforcing that right in collateral proceedings in multiple cases, raises "an important question of federal law . . . in a way that conflicts with applicable decisions of this court." Sup. Ct. Rules, Rule 10.1(c).

This Court's evolving jurisprudence is continually restricting the availability of federal review in habeas corpus of constitutional violations arising in state criminal proceedings. The theory underlying this restriction has been the assumption that state courts will in fact enforce federal constitutional rights. See, e.g., Brecht v. Abrahamson, supra, 61 U.S.L.W. at 4348; Saffle v. Parks, 494 U.S. 484, 488 (1990); Teague v. Lane, 489 U.S. 288, 310 (1989); Stone v. Powell, supra, 418 U.S. at 494 n. 37. Whatever support this theory may have in general, it cannot be questioned that, in this specific case, the highest court of a state has completely failed to follow this court's explicit pronouncements. If this Court is to continue to restrict federal review on the basis of its perception that state courts follow applicable constitutional precedents, the legitimacy of its position can be sustained only by an equal willingness to intervene when, as here, that perception is demonstrably false.

CONCLUSION

For these reasons, petitioner submits that this Court should grant a writ of certiorari, vacate the judgment of the Supreme Court of Nevada, and remand the case for reconsideration in light of Griffith v. Kentucky.

Dated: May 21, 1993.

Respectfully submitted,

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APPENDIX

SERIES

rilege pursuant to § 26–1–803,

it determine whether the above violation prejudiced substantial he appellant. Section 2–4–704(2), substantial rights were preju- n reversal is appropriate. *See State Dept. of Revenue* (1988), 152, 766 P.2d 850.

t of prejudicial error requiring is whether there is a reasonable ty the inadmissible evidence ave contributed to the verdict. *v. State* (1989), 239 Mont. 110, 1 (quoting *State v. Gray* (1983) 261, 268, 673 P.2d 1262, 1266). viewing the record, we conclude is a reasonable possibility that rivileged documents contributed decision. We hold that admis- eight documents prejudiced sub- ghts of PacifiCorp, and did not harmless error.

rm the District Court's conclu- PacifiCorp did not waive its at- nt privilege and that remand to necessary. We reverse the Dis- 's conclusion that the MTC audit iscoverable under Montana law. e is remanded to the State Tax ard for further proceedings con- h this opinion.

GE, C.J., and HUNT, WEBER, IGH and GRAY, JJ., concur.

ON, Justice, dissenting.

disagree with the majority's rea- his opinion and therefore dissent ing herein.

Kitrich POWELL, Appellant,

v.

The STATE of Nevada, Respondent.

No. 22348.

Supreme Court of Nevada.

Sept. 3, 1992.

Defendant was convicted of first-degree murder of girlfriend's four-year-old child by the Eighth Judicial District Court, Clark County, John S. McGroarty, J., and he appealed. The Supreme Court held that: (1) defendant waived right to complain of State's delay in bringing him before magistrate for preliminary hearing; (2) decision to shackle defendant during penalty phase of case was not abuse of discretion; and (3) death sentence was not excessive given nature of crime and of defendant.

Affirmed.

1. Arrest ⇐70(2)

Purpose of statute requiring that preliminary hearing be held within 72 hours of defendant's arrest is to prevent police from resorting to secret interrogations and coercive tactics. N.R.S. 171.178.

2. Criminal Law ⇐1166(1)

In order to be entitled to relief, defendant must show prejudice resulting from state's delay in bringing him before magistrate for preliminary hearing. N.R.S. 171.178.

3. Courts ⇐100(1)

United States Supreme Court's *McLaughlin* decision, that suspect must be brought before magistrate for preliminary hearing within 48 hours of his arrest, could not be applied retroactively to cases in which preliminary hearing was held before *McLaughlin* was announced. U.S.C.A. Const.Amend. 4.

4. Courts ⇐100(1)

Factors to be weighed in determining whether judicial decision may be applied retroactively are: purpose of decision; reliance on prior, contrary law; and effect that retroactive application would have on administration of justice.

5. Arrest ⇐70(2)

Defendant waived right to appearance before magistrate within 72 hours of his arrest, by voluntarily waiving his right to remain silent and right to attorney and making incriminating statement to police. N.R.S. 171.178; U.S.C.A. Const.Amends. 5, 6.

6. Criminal Law ⇐661

Decision to admit or exclude evidence is within discretion of trial judge, and judge's determination will not be overturned on appeal absent manifest error.

7. Criminal Law ⇐369.2(4)

Other crimes evidence consisting of defendant's threats to kill murder victim's 14-year-old sister unless she lied at defendant's trial was admissible, under "complete story of crime" doctrine, in order to explain why defendant would admit to the sister that he had killed victim.

8. Criminal Law ⇐369.2(2)

"Complete story of crime" doctrine provides that, under certain circumstances, evidence of another crime may be introduced at trial if other crime is interconnected to act in question, such that witness cannot describe act in question without referring to this other crime. N.R.S. 48.035, subd. 3.

9. Homicide ⇐22(2), 286(3)

Terms "deliberate," "premeditated" and "willful," as used in first-degree murder statute, all connote the same general idea of intention to kill; accordingly, if jury is properly instructed on concept of "premeditation," it is not necessary to separately define "deliberateness" or "willfulness." N.R.S. 200.010, 200.030.

10. Homicide ⇐230, 232

Nature and extent of murder victim's injuries may constitute evidence of defendant's willfulness, premeditation and deliberation, within meaning of first-degree murder statute. N.R.S. 200.010, 200.030.

11. Criminal Law ⇐637

Right of defendant to be free from shackles during guilt phase of trial is designed to protect presumption of innocence.

12. Criminal Law ⇐637

Defendant no longer has any constitutional right to be free of prison garb and shackles during penalty phase of case, inasmuch as there is no longer any presumption of innocence.

13. Criminal Law ⇐637

Decision concerning restraint of defendant during penalty phase of case is within sound discretion of trial court, after balancing state's interests for safety against interests of defendant.

14. Criminal Law ⇐637

Requiring first-degree murder defendant to wear leg restraints during penalty phase of case and to be accompanied by law enforcement personnel was not abuse of discretion, in light of defendant's threats to poke out eyes of law enforcement officers, sexual remarks to prosecutor, and threats to show court violence.

15. Criminal Law ⇐637

Trial judge did not improperly delegate to bailiff his discretion with regard to security measures by soliciting bailiff's opinion regarding need to shackle defendant during penalty phase of murder case.

16. Criminal Law ⇐637

In exercising his discretion to restrain defendant during penalty phase of trial, judge may heed knowledge of court officers regarding defendant's record, characteristics and tendency, and may consider officer's recommendation.

17. Homicide ⇐358(1)

Evidence regarding first-degree murder defendant's alleged molestation of 12-year-old girl was admissible during penalty phase of case, as relevant to defendant's character and as integral part of explaining defendant's death threat against girl's father.

18. Criminal Law ⇐986.1

Character evidence which is neither dubious nor tenuous is properly admitted during penalty hearing.

19. Homicide ⇐311

Penalty phase instruction in capital murder case, that jurors were not to be influenced by sympathy, prejudice or public opinion, did not improperly prevent jurors from exercising mercy or compassion, in light of trial court's instruction that they were to consider all mitigating circumstances.

20. Criminal Law ⇐796

Penalty phase instruction in capital murder case, that jurors were to consider "any other mitigating circumstances," was not improper as failing to provide specific guidelines for considering mitigating evidence of defendant's background and character; jury was instructed that it could find mitigating circumstance even though circumstance was not sufficient to constitute defense or to reduce degree of crime.

21. Homicide ⇐357(4, 5)

Death sentence was not excessive for first-degree murder defendant who had previously been convicted of other violent crime, in light of evidence that defendant had repeatedly subjected four-year-old victim to brutal beatings, which left her covered with injuries literally from her head to her toe, and in light of defendant's inability to present even one person who had "anything good to say" about him. N.R.S. 200.010, 200.030.

Lee Elizabeth McMahon, Las Vegas, for appellant.

Frankie Sue Del Papa, Atty. Gen., Carson City, Rex Bell, Dist. Atty., James Tufteland, Chief Deputy Dist. Atty., and Daniel M. Seaton, Deputy Dist. Atty., Clark County, Las Vegas, for respondent.

OPINION

PER CURIAM:

A jury convicted appellant Kitrich Powell (Powell) of first degree murder in the death of four-year-old Melea Allen (Melea). Powell had subjected the child to repeated beatings which resulted in a variety of injuries, one of which caused her death. Powell was sentenced to death following a penalty hearing. For the following reasons, we affirm both the conviction and the sentence.

Facts

Powell met Sharon Allen and her three children in September 1989 at a Salvation Army shelter in Las Vegas, Nevada. The Allens and Powell then moved in and out of several apartments and motels for the next two months. During this period, Mrs. Allen worked at Deseret Industries from 8:30 a.m. until 5:00 p.m. Powell stayed home and took care of Melea while the older children were at school and Mrs. Allen was at work.

Neighbors noticed that Melea had bruises on her face and legs, a cut chin and that one of her eyes was quite red. On one occasion, a neighbor heard Melea screaming and crying. When he saw Melea approximately one and one-half hours later, he noticed new bruises on her face and legs which had not been there the night before. In the neighbor's presence, Powell asked Melea how she had gotten hurt, and she answered: "Daddy, you did it." Powell then said, "No, baby, remember you fell in the tub, remember?" Powell and Melea repeated this conversation a couple of times.

The testimony at trial indicated that Powell cruelly teased Melea and mistreated her physically in the presence of others. On the evening of November 2, 1989, Melea was quiet and inactive. She could not move her head and was complaining of head and neck pain. The left side of her head was soft and spongy, and she had a new bruise on her forehead. She told her mother and siblings that "Daddy" (Powell) had dropped her on her head when he was lifting her over his shoulder. Melea was not taken to a hospital by either Powell or Mrs. Allen on the day these new injuries occurred.

The next morning, November 3, 1989, Melea could not hold up her head and could not walk without assistance. Mrs. Allen went to work as usual, and Powell delayed seeking medical treatment for Melea until late that morning. By the time Melea was admitted to the emergency room of the hospital, she was unconscious and in critical condition. An examination of the comatose child revealed a deep laceration on her chin, which was in the process of healing, and a number of bruises which were in different stages of healing. Melea's buttocks showed a pattern of several injuries on top of one another. She had extensive bruising all over her body and her spine was fractured. Melea's head showed evidence of several injuries. The most recent and severe injury had caused her brain to swell and was the cause of the coma. Melea's head injury was most likely caused by a blunt trauma which carried considerable force. The State's expert witness, Dr. Richard Krugman, testified that in the last three years he had seen only one head injury which was similar to Melea's. That injury resulted from an adolescent being propelled off the top of a pickup truck at forty-five miles per hour onto a concrete surface. Melea's injuries suggested a repetitive pattern of daily injury. All three physicians who testified agreed that Melea's injuries were not the result of accidents and that Melea had been subjected to severe abuse for some time. Without regaining consciousness, Melea died from the head injury on November 8, 1989.

Originally, Powell was arrested and charged with child abuse with substantial bodily harm (NRS 200.508). Shortly after Melea's death, Powell was additionally charged with murder (NRS 200.010; NRS 200.030). Following a jury trial, Powell was found guilty of murder in the first degree. Following a penalty hearing, the jury imposed a sentence of death. This appeal followed. On appeal, Powell asserts several assignments of error, which we now address.

Delay in Appearing Before a Magistrate

[1, 2] Powell argues that he was not brought before a magistrate within seven-

ty-two hours as required by NRS 171.178(3). NRS 171.178(3) provides:

> 3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:
>
> (a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and
>
> (b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.

The purpose of NRS 171.178 is to prevent the police from resorting to secret interrogations and coercive tactics. *Huebner v. State*, 103 Nev. 29, 32, 731 P.2d 1330, 1333 (1987). This court has repeatedly held that the defendant must show prejudice which resulted from the delay. *See e.g., Id.* at 32, 731 P.2d at 1333; *Morgan v. Sheriff*, 92 Nev. 544, 546, 554 P.2d 733, 734 (1976).

Powell was arrested on Friday, November 3, 1989. A magistrate found probable cause to hold Powell for a preliminary hearing on Tuesday, November 7, 1989. It is unclear from the record whether Powell was present before the magistrate on this day. Powell contends that he was not brought before a magistrate until November 13, 1989. On November 3, 1989, and November 7, 1989, prior to his initial appearance, Powell made statements to the police. He admitted to spanking Melea for wetting her pants and slapping her on other occasions. Powell told officials that he never intended to hurt "the baby." These statements, which were presented to the jury, were clearly prejudicial to Powell.

We initially note that the United States Supreme Court has provided additional guidance on the issue of what constitutes a timely initial appearance. *See County of Riverside v. McLaughlin*, — U.S. —, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). In *McLaughlin*, the Court stated that the Fourth Amendment allows for a reasonable delay of a probable cause determination while authorities are processing suspects through the criminal justice system. *Id.* — U.S. at —, 111 S.Ct. at 1669. The Court then went on to state that a judicial determination of probable cause within forty-eight hours of arrest comports with the promptness requirement set forth in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). *McLaughlin*, — U.S. at —, 111 S.Ct. at 1670. Intervening weekends (and implicitly, holidays or other non-judicial days) are included in the calculation of forty-eight hours. *Id.* If the suspect does not receive a probable cause determination within forty-eight hours, the State must prove that the delay was due to a bona fide emergency or other extraordinary circumstance. *Id.*

[3, 4] The *McLaughlin* case renders NRS 171.178(3) unconstitutional insofar that it permits an initial appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours. Based on *McLaughlin*, we hold that a suspect must come before a magistrate within forty-eight hours, including non-judicial days, for a probable cause determination.[1]

[5] However, the analysis of whether or not Powell's rights were violated does not end with the mere facts of a delay and incriminating statements. We have previously held that an accused waives his right to a seasonal arraignment when he voluntarily waives his right to remain silent. *Deutscher v. State*, 95 Nev. 669, 601 P.2d 407 (1979), *vacated on other grounds*, — U.S. —, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991). There, we stated:

> We subscribe to the rule of law which provides that when an accused voluntarily waives his right to silence and his right to counsel, he concurrently waives his right to be seasonably arraigned. The reason for this rule is that the primary purpose of an arraignment is to inform the defendant of his rights. But a delay in arraignment is not prejudicial when a defendant has already been advised of his rights, was promptly so advised, and voluntarily waived his rights. This is particularly so when the delay is not flagrant and the record is silent relative to any other irregularities which go to the issue of voluntariness.

Id. at 680, 601 P.2d at 414 (citations omitted).

Powell does not challenge the voluntariness of his statements, nor is there any indication in the record that the statements were involuntary. During the first interview on November 3, 1989, prior to being formally arrested, Powell left the interview twice in order to smoke a cigarette. Powell's conduct indicates that he felt free to leave the interview at any time and that he was not coerced or involuntarily detained in any way. On November 7, 1989, Powell was read his Miranda rights prior to the interview, and he waived those rights. There is no indication that the waiver was involuntary.

Irrespective of when Powell was brought before a magistrate, he waived his right to remain silent and his right to counsel. By waiving those rights, he thereby waived his right to a timely arraignment. *Deutscher*, 95 Nev. at 680, 601 P.2d at 414. The same reasoning this court employed in *Deutscher* applies to the requirement of an initial appearance before a magistrate within the prescribed time limit. At the initial appearance, Powell would have been advised, *inter alia*, of the right to counsel and the right to remain silent. NRS 171.186.[2] One of the purposes of a speedy arraignment is to ensure that the suspect is informed of his Fifth Amendment right against self-incrimination. *Huebner v. State*, 103 Nev. 29, 32, 731 P.2d 1330, 1333 (1987). The same is true of a timely first appearance. Powell was advised of his rights on November 7, 1989, when he gave a statement to the police, and he voluntarily waived those rights. We therefore conclude that by waiving his right to remain silent and his right to counsel, Powell waived his right to an appearance before a magistrate within seventy-two hours.

Evidence of a Prior Bad Act in the Guilt Phase

[6] Melea's fourteen-year-old sister, Melinda, testified that prior to trial, Powell asked her to lie for him at trial and that he repeatedly made harassing phone calls to her. Powell told her that he had killed Melea and threatened Melinda by saying that she "was next." Prior to Melinda's testimony, defense counsel moved to exclude the statement regarding the threat, because it constituted proof of another crime. The State offered the statement as proof of Powell's intent to kill Melea. NRS 48.045(2).[3] The district court denied the

1. It is important to note that the forty-eight hour requirement mandated by *McLaughlin* does not apply to the case at hand. When a case announces a new rule of law, the application of the rule is prospective unless it is a rule of constitutional law; and then it is only applied retroactively under certain circumstances. *Gier v. District Court*, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990). The factors to be weighed in determining retroactivity are: "(1) the purpose of the rule; (2) the reliance on prior, contrary law; and (3) the effect retroactive application would have on the administration of justice." *Franklin v. State*, 98 Nev. 266, 269 n. 2, 646 P.2d 543, 545 n. 2 (1982) (citing *Tehan v. United States*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966)).

We conclude that the new rule announced in *McLaughlin* would not apply retroactively, if only for the monumental negative impact which retroactive application would have on the administration of justice in Nevada. Were *McLaughlin* to be applied retroactively, untold numbers of prisoners would be set free because they were not brought before a magistrate within forty-eight hours.

2. NRS 171.186 prescribes the rights of the defendant prior to a preliminary hearing. NRS 171.186 provides:

> The magistrate or master shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel, and shall admit the defendant to bail as provided in this Title.

3. NRS 48.045(2) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

motion, stating that there was no showing of unfair prejudice, confusion of the issues or misleading the jury if the testimony were allowed. The decision to admit or exclude evidence, after balancing the prejudicial effect with the probative value, is within the discretion of the trial judge. *Petrocelli v. State*, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985); *see also* NRS 48.035(1) and (2).[4] The trial court's determination will not be overturned absent manifest error. *Petrocelli*, 101 Nev. at 52, 692 P.2d at 508.

[7, 8] We conclude that the district court did not abuse its discretion in allowing the threat to be presented to the jury. The testimony was admissible under NRS 48.045 as proof of intent to kill Melea, as well as the "complete story of the crime" doctrine. That doctrine provides that under certain circumstances, evidence of another crime may be introduced at trial when the other crime is interconnected to the act in question such that a witness cannot describe the act in controversy without referring to the other crime. *See* NRS 48.035(3);[5] *Cirillo v. State*, 96 Nev. 489, 493, 611 P.2d 1093, 1095 (1980). The doctrine is applicable in this case. Here, Melinda could not describe Powell's admission that he had murdered Melea without describing the context in which the statement was made. Otherwise, the jury would have had no idea why Powell would "confess" to a fourteen-year-old child.

Guilt Phase Jury Instructions on Willfulness, Deliberateness and Premeditation

[9] Powell contends that the jury was not provided with an instruction defining "willful" or "deliberate" and that in the absence of such definitions, the jury was misled to believe that the State was only required to prove that Powell acted with premeditation.

Powell asserts that Jury Instruction No. 9 was incomplete because it merely defined premeditation. Jury Instruction No. 9 provided:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Powell contends that this instruction directed the jury that if it found premeditation, it was to automatically find willfulness and deliberation as well.

In *Briano v. State*, 94 Nev. 422, 581 P.2d 5 (1978), this court referred to "deliberate and premeditated" as a single term and not separate elements requiring separate thought processes. We recently considered deliberateness in *DePasquale v. State*, 106 Nev. 843, 803 P.2d 218 (1990), *cert. denied*, — U.S. —, 112 S.Ct. 99, 116 L.Ed.2d 70 (1991). There, we stated:

> Premeditation and deliberation can be inferred from the nature and extent of the injuries, coupled with repeated blows. Given the brutal and extensive nature of Mr. Cane's injuries (including injuries to the head, torso, ribs and back), an inference of premeditation and deliberation can be reasonably drawn. This is particularly true when considering the metal rod which was inserted deeply into the victim's ear. It is difficult to imagine such a process occurring without deliberate thought.

Id. at 848, 803 P.2d at 221. In *DePasquale*, as in *Briano*, we used the terms premeditated and deliberate as a single term.

Other jurisdictions have held that the terms deliberate, premeditated and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death to result. *See Sanders v. State*, 392 So.2d 1280, 1282 (Ala.Crim.App. 1981) (the terms premeditation and deliberation may be grouped together under the phrase "formed design"); *People v. Fusselman*, 46 Cal.App.3d 289, 299, 120 Cal.Rptr. 282 (1975) (distinguishing malice aforethought from the phrase "willful, deliberate and premeditated"; the latter phrase indicates a frame of mind in which the actor weighs the course of action and chooses to kill); *Fuller v. State*, 45 Md. App. 414, 413 A.2d 277, 280 (1980) (the trilogy of terms "willful, deliberate and premeditated" connote the same general idea of the intention to kill); *Commonwealth v. Nelson*, 514 Pa. 262, 523 A.2d 728, 732 (1987) (a willful, deliberate and premeditated killing is one where the actor has specific intent to bring about the death of the victim). In *Fuller*, the Maryland Court of Special Appeals queried whether the three adjectives described three different aspects of the mental state of intent to kill or whether the terms were simply a rhetorical expression used for emphasis. *Fuller*, 413 A.2d at 280. The court went on to ask if the act could be willful (a specific design and purpose to kill) without simultaneously being deliberate (conscious knowledge of the purpose to kill). *Id.* We agree with the Maryland court when it stated: "The trilogy of terms connotes the same general idea—the intention to kill. The use of all three words would seem to us to serve no purpose other than to shroud the intention in an aura of redundancy so as to convey the seriousness of the matter." *Id.* at 280 (quoting *Brown v. State*, 44 Md.App. 71, 410 A.2d 17, 22 (1979)).

We have set forth the requirement for premeditation in *Briano v. State*, 94 Nev. 422, 581 P.2d 5 (1978), where we stated "[T]he state must prove that a design to kill was distinctly and rationally formed in the mind of the perpetrator, at or before the time the fatal blows were struck.... [I]t [does not] matter how short a time existed between the formation of the design to kill and the killing itself." *Id.* at 425, 581 P.2d at 7. As long as the instruction on premeditation which is given to the jury comports with *Briano*, it is not necessary to separately define deliberateness or willfulness. The instruction on premeditation which was given to the jury in the case at hand was an accurate definition. We therefore conclude that Powell's argument has no merit.

Guilt Phase Instruction on What Constitutes Evidence of Willfulness, Premeditation and Deliberation

[10] Powell takes exception to Jury Instruction No. 10, arguing that it constituted an impermissible comment on the evidence by the court because it instructed the jury what evidence it could consider to show willfulness and deliberateness. The instruction read: "The nature and extent of the injuries, coupled with repeated blows, may constitute evidence of willfulness, premeditation and deliberation."

This court has sanctioned a finding of premeditation and deliberation inferred from the circumstances of the killing in several cases. *See e.g., DePasquale v. State*, 106 Nev. 843, 803 P.2d 218 (1990); *Hern v. State*, 97 Nev. 529, 635 P.2d 278 (1981); *Curtis v. State*, 93 Nev. 504, 568 P.2d 583 (1977). In fact, in *DePasquale*, this court used language nearly identical to the instruction about which Powell complains. There, we stated that "[p]remeditation and deliberation can be inferred from the nature and extent of the injuries, coupled with repeated blows." *DePasquale*, 106 Nev. at 848, 803 P.2d at 221. The jury instruction did not, therefore, constitute an impermissible comment on the evidence.

4. **48.035 Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.**

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence....

5. NRS 48.035(3) provides in relevant part:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded....

Powell's Appearance in Shackles During the Penalty Phase

During both the guilt phase and the penalty phase of the trial, Powell exhibited disruptive and threatening behavior. The first outburst by Powell occurred during the guilt phase of the trial when one of the prosecutors informed the court that Powell had made derogatory remarks regarding a witness' sexual preference as the witness was walking to the stand. The judge declined to make a direct order, because he had not heard the comments himself. The judge suggested that defense counsel speak to Powell, whereupon Powell stated, "Mr. Seaton has commented on me and f—— me in my a— two or three different times since I have been in [the] courtroom now. Now, that's out of line. Now, you admonish him because of his outrageous behavior." The judge then enjoined everyone from making any personal comments about any of the parties, counsel or any other officers of the court. Within minutes, one of the prosecutors informed the court that Powell was making inappropriate comments, which were not specified, to the prosecutors. Powell was admonished again.[6]

During the penalty phase of the trial, Powell angrily interrupted the testimony of a former neighbor, accusing the witness of lying. The court recessed early for lunch, admonishing Powell to "cool off." After court resumed, but before the jury was brought in, the court stated:

> We observed, for the record, that Mr. Powell reacted angrily to the testimony of his former neighbor, Bob Yoho, the individual who knew him from his home town. Rather than allow the defendant to continue with his verbal outburst, the court took a recess for lunch.... Now, for the record, we have had some additional developments since we broke for lunch; is that correct?

The bailiff then informed the court that when Powell was told he would remain in leg shackles (as apparently had been decided in chambers), he looked at the officers and said, "What are you looking at, you pig scumbag," and "Before this is over I'll get one of you. Take off your badge and your gun, I'll whip your a—," and "I am quicker than I seem to be," or "I'm quicker than I appear." The bailiff told the court that Powell went on to say "Before this is over, I'll get your eye, I'll take your eye." One of the prosecutors informed the court that when she came back from the lunch break, Powell made remarks to her of a sexual nature, and stated, "If they want to see violence, I'll show them violence." The court ordered Powell to be put in leg and arm restraints for the remainder of the penalty phase.

Later in the penalty phase, defense counsel requested that the shackles be removed prior to Powell testifying in order to avoid prejudicing the jury. The court ordered Powell to remain in hand and leg shackles, explaining that the ruling was based on Powell's outbursts and his "hair-trigger temper" which resulted in the need to protect the safety of the jury and court personnel. The defense then requested alternatively that Powell be unshackled but accompanied by law enforcement personnel while he was on the witness stand. The court asked the bailiff if that arrangement was acceptable to him, and the bailiff indicated that he thought Powell should be in leg shackles because of the close proximity of the witness stand to the bench and the jury. The court then ruled that Powell's hands and arms would be unshackled but that the leg shackles would remain. The leg shackles could not be seen by the jury while Powell was on the witness stand. During Powell's testimony, the bailiff sat in the jury box.

Powell asserts that it was error for the district court to force him to appear in shackles during the penalty phase of the trial and to be accompanied by law enforcement personnel.

[11-13] The standard for restraint during the penalty phase is elucidated in *Duckett v. State*, 104 Nev. 6, 752 P.2d 752 (1988). In *Duckett*, this court stated that the right of a defendant to be free from

6. We note that this entire interchange was outside the presence of the jury.

shackles during the guilt phase of the trial is designed to protect the presumption of innocence. *Id.* at 11, 752 P.2d at 755. During the penalty phase, there is no longer a presumption of innocence and therefore the constitutional guarantee to be free of prison garb and shackles no longer exists. *Id.* During the penalty phase, public safety concerns are to be afforded greater significance. *Id.* The decision concerning restraint of the defendant during the penalty phase of the trial is within the sound discretion of the trial court, after balancing the state's interests for safety against the interests of the defendant. *Id.* The court's decision will not be overturned absent an abuse of discretion. *Id.*

[14] In *Duckett*, this court stated that the defendant stood convicted of a brutal murder of two people, for which the death penalty could be imposed, and he "might have concluded that he had nothing to lose from further acts of violence." *Id.* at 12, 752 P.2d at 755. The facts in this case demonstrate an even greater need for security than the facts in *Duckett*. Here, Powell threatened to poke out the eyes of law enforcement officers, made sexual remarks to a prosecutor, harassed a witness and threatened to "show [the court] violence." We hold that it was not an abuse of discretion to shackle Powell during the penalty phase of the trial.

Delegation of Discretion to the Bailiff

[15] Powell also argues that the district court erred in delegating its discretion with regard to security measures to the bailiff. Powell asserts that it was error for the district court to ask the bailiff if it was acceptable to him that Powell be unshackled while on the witness stand.

[16] When exercising discretion in restraining the defendant, a trial judge has the right to give heed to an officer of the court's knowledge regarding the defendant's record, characteristics and tendencies. *State v. McKay*, 63 Nev. 118, 157, 165 P.2d 389, 406 (1946). The trial judge may also consider the officer's recommendation. *Id.*

The record clearly indicates that the court was exercising its own discretion in determining which method of restraint was appropriate under the circumstances and merely consulted the bailiff for his opinion. We note that the court also considered the wishes of both defense counsel and the prosecution. The bailiff was the officer who heard the defendant threaten to poke out an officer's eye. The bailiff clearly had knowledge of Powell's tendencies and characteristics, and the district court was entitled to consider the bailiff's knowledge. We therefore find no merit in Powell's contention.

Evidence of a Prior Bad Act in the Penalty Phase

[17] During the penalty phase of the trial, Thomas Kucera (Kucera) testified that he formerly ran a halfway house for parolees and that Powell stayed there in early 1989. After Powell had been at the halfway house for two weeks, Kucera's twelve-year-old daughter informed him that Powell had molested her, whereupon Kucera told Powell to move out. Kucera telephoned Powell's probation officer to report the incident while Powell was present. Powell then said angrily, "I am going to kill you. No, I am not going to do it. I will have somebody else do it." The trial court allowed the testimony, finding that the probative value of the evidence outweighed the prejudice to Powell.

Powell asserts that the testimony of the molestation should not have been admitted, as it was more prejudicial than probative. *See* NRS 48.035(1). Powell argues that the testimony of the death threat could have been introduced without the reference to the molestation and that the testimony created an impression in the jury's mind that Powell had a pattern of mistreating young girls.

[18] During a penalty hearing, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." NRS

175.552. This court has previously sanctioned the admission of testimony during a penalty hearing regarding an attempted sexual assault. *Biondi v. State*, 101 Nev. 252, 699 P.2d 1062 (1985). In *Biondi*, this court held that character evidence which is neither dubious nor tenuous is properly admitted during the penalty hearing. *Id.* at 257, 699 P.2d at 1065–66. Testimony regarding sexual assault is relevant to the defendant's character. *Id.* Powell fails to make any argument as to how Kucera's testimony was not credible. Further, the testimony regarding the molestation was an integral part of explaining the death threat against Kucera. We therefore conclude that the district court was within the range of its discretion in finding the testimony was more probative than prejudicial.

"Anti-sympathy" Jury Instruction

[19] Part of Jury Instruction No. 12, which was given during the penalty phase, read: "A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law."

Powell argues that a reasonable juror could interpret the language as an instruction to discard mercy and compassion as well as the mitigating circumstances in sentencing him.

Powell's contention is without merit. In *Riley v. State*, 107 Nev. 205, 808 P.2d 551 (1991), we stated, "This court has previously ruled that it is not error to instruct the jury not to be influenced by sympathy if the court also instructs the jury to consider mitigating circumstances." *Id.* at 215, 808 P.2d at 557 (citations omitted). Here, the jury was instructed to consider mitigating circumstances. Based on our holding in *Riley*, it was not error to give this instruction.

Instruction on "Any other Mitigating Circumstances"

[20] The jury was instructed on mitigating circumstances in Jury Instruction No. 8, which provides in relevant part:

> Murder of the First Degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime;
>
> . . . .
>
> 8. Any other mitigating circumstances.

Powell takes exception with the phrase "any other mitigating circumstances." Powell argues that this "catch-all" language fails to provide the jury with specific guidelines for considering mitigating evidence of his background and character.

This court considered the exact same argument in *Flanagan v. State*, 107 Nev. 243, 810 P.2d 759 (1991), *vacated on other grounds*, — U.S. —, 112 S.Ct. 1464, 117 L.Ed.2d 610 (1992). There, this court stated:

> [A] reasonable juror would conclude that mitigation was not restricted to crime-related factors because it was stated that the mitigating circumstances did *not* have to constitute a defense or reduce the degree of the crime. Furthermore, the jury in fact found two of the three mitigating circumstances to exist. In addition, the instruction as a whole adequately informed the jury of its right and duty to consider mitigating evidence. Finally, it is highly unlikely that a different outcome would have resulted from more specific instructions, given that the evidence of aggravating circumstances was overwhelming and clearly outweighed the mitigating circumstances found by the jury. Thus, we conclude that Instruction 8 did not violate the Eighth Amendment by impermissibly limiting the jury's consideration of mitigation to evidence related to the crime.

Id. at 249, 810 P.2d at 762–63. (Emphasis in original.)

Here, the jury was similarly instructed that it could find a mitigating circumstance even though that circumstance was not sufficient to constitute a defense or reduce the degree of the crime. The jury also found four aggravating circumstances and *no* mitigating circumstances; the aggravating

circumstances obviously outweighed the mitigating circumstances. In light of *Flanagan*, Powell's argument is without merit.

NRS 177.055 Considerations

[21] This court must consider the certain issues in all cases where the death penalty is imposed under NRS 177.055. NRS 177.055 provides in relevant part:

> 2. [T]he sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding if an appeal is taken:
>
> . . . .
>
> (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (c) Whether the sentence of death was imposed under the influence of passion, prejudice, or any arbitrary factor; and
>
> (d) Whether the sentence of death is excessive, considering both the crime and the defendant.

We will discuss each of these issues in turn.

The evidence clearly supported the finding of the aggravating circumstances in this case. NRS 177.055(2)(b). Powell was under a sentence of imprisonment for three crimes: robbery with a firearm and two counts of second degree burglary (aggravating circumstances under NRS 200.033(1)). Further, the evidence which was admitted at the penalty hearing firmly established that Powell had previously been convicted of a felony involving the use or threat of violence to another: robbery with a firearm (aggravating circumstance under NRS 200.033(2)).

We have examined the record and conclude that the sentence was not imposed under the influence of passion, prejudice or any arbitrary factor. NRS 177.055(2)(c). We also conclude that the sentence of death is not excessive. Over time, Powell repeatedly subjected four-year-old Melea to brutal beatings, one of which eventually took her life. Every surface of the child's body was covered with injuries, literally head to toe. She had suffered several head injuries and her spine was fractured. Further, at the penalty hearing, only one witness appeared on Powell's behalf. The defense investigator who contacted Powell's family and friends indicated that he was unable to find one person who had "anything good to say" about Powell. We therefore conclude that given the crime and the defendant, the sentence of death was not excessive. NRS 177.055(2)(d).

Conclusion

We have considered Powell's remaining allegations of error and find them to be without merit. Consequently, we affirm the judgment against him and the sentence of death.

IN THE SUPREME COURT OF THE STATE OF NEVADA

KITRICH POWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 22348

FILED

FEB 23 1993

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

cc: Hon. John S. McGroarty, District Judge
Hon. Stephen Webster, Municipal Court Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney
Lee Elizabeth McMahon
Michael Pescetta
Loretta Bowman, Clerk

[1]We deny all pending motions. The Honorable Miriam Shearing, Justice, did not participate in the decision of this appeal.

FEB 25 1993

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

RECEIVED
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SUPREME COURT, U.S.

KITRICH POWELL, PETITIONER,

v.

THE STATE OF NEVADA, RESPONDENT.

CERTIFICATE OF SERVICE

I, Michael Pescetta, declare that I am over the age of 18 years, not a party to the within cause and a member of the bar of this Court; my business address is 330 South Third Street, Suite 701, Las Vegas, Nevada 89101. I served a true copy of the attached:

Petition for Writ of Certiorari and

Motion to Proceed in Forma Pauperis

on each of the following, by placing same in an envelope addressed as follows:

Rex Bell, District Attorney
Clark County District Attorney
200 South Third Street
Las Vegas, Nevada 89155

Frankie Sue Del Papa, Attorney General
State of Nevada
Heroes Memorial Building, Capitol Complex
Carson City, Nevada 89710

Each said envelope was then, on May 21, 1993, sealed and deposited in the United States mail at Las Vegas, Clark County, Nevada, the county in which I am employed, with the postage thereon fully prepaid. I certify that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 21, 1993 at Las Vegas, Nevada.

Counsel for Petitioner

ORIGINAL

Supreme Court, U.S.
FILED
JUL 26 1993
OFFICE OF THE CLERK

NO. 92-8841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

KITRICH POWELL,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

RECEIVED
JUL 28 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

REX BELL
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JAMES TUFTELAND*
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QUESTIONS PRESENTED

1. Whether this Court's opinion in County of Riverside v. McLaughlin is legally relevant to Powell's allegation of a denial of his statutory right to a speedy arraignment.

2. Whether County of Riverside v. McLaughlin declared a new constitutional rule of criminal procedure so as to require the Nevada Supreme Court to apply McLaughlin pursuant to Griffith v. Kentucky.

3. Whether Powell waived his statutory right to a speedy arraignment when he received a Miranda warning and voluntarily agreed to speak with police officers without counsel being present.

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NO. 92-8841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

KITRICH POWELL,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Nevada Supreme Court is cited as Powell v. State, 838 P.2d 921 (Nev. 1992). Petitioner has included a copy in the appendix attached to his Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, Kitrich Powell, was initially charged by way of criminal complaint with child abuse with substantial bodily harm. Following the death of the four year old abused child however, an amended criminal complaint was filed charging Defendant with murder.

A jury trial was held in the Eighth Judicial District of Nevada, and Defendant was found guilty of murder of the first degree. Following the penalty phase of the trial, the jury returned a verdict of death. On June 10, 1991, the trial court adjudged Defendant guilty and imposed the sentence of death. Petitioner then appealed to the Nevada Supreme Court.

In Powell v. State, supra, the Nevada Supreme Court affirmed Petitioner's conviction and sentence. The Nevada court held that the Petitioner waived his right to a timely arraignment when he waived his right to remain silent and his right to counsel.

Thereafter, Powell petitioned the Nevada Supreme Court for a rehearing. The State filed an answer agreeing that the Court should rehear but only for the purpose of deleting the Court's discussion of County of Riverside v. McLaughlin, ____ U.S. _____, 111 S.Ct. 1661 (1991) because it was irrelevant to Powell's argument regarding a violation of Nevada's speedy arraignment statute. The petition for rehearing was denied. The instant petition followed.

SUMMARY OF THE ARGUMENT

1. Petitioner claimed on appeal to the Nevada Supreme Court that his statutory right to a speedy arraignment had been violated. He did not raise the constitutional issue whether his right to a probable cause determination by a neutral magistrate for continued detention had been violated under Gerstein v. Pugh. This Court's opinion in County of Riverside v. McLaughlin is limited to Gerstein issues, not speedy arraignment issues. McLaughlin is therefore not legally relevant to Powell's case.

2. County of Riverside v. McLaughlin did not announce a new constitutional rule of criminal procedure and thus the retroactivicty analysis set forth in Griffith v. Kentucky is not applicable and the Nevada Supreme Court had no obligation to apply McLaughlin to Powell's case.

3. The Nevada Supreme Court discussed Powell's contention in the alternative and analyzed his argument after assuming his right to a speedy arraignment had been violated. The court thus did not refuse to consider McLaughlin (even though it is legally irrelevant to Powell's case. See Argument I).

A R G U M E N T

I

THIS COURT'S OPINION IN COUNTY OF RIVERSIDE V. McLAUGHLIN WAS LEGALLY IRRELEVANT TO POWELL'S DIRECT APPEAL TO THE SUPREME COURT OF NEVADA AND THEREFORE THE SUPREME COURT OF OF NEVADA HAD NO DUTY TO APPLY McLAUGHLIN TO ITS ANALYSIS OF POWELL'S UNTIMELY ARRAIGNMENT CLAIM

In his direct appeal of his conviction to the Supreme Court of Nevada, Powell argued that the State failed to comply with *Nev. Rev. Stat. 171.178*. See Respondent's Appendix (hereinafter referred to as R.A.), Exhibit 1. *Nev. Rev. Stat. 171.178* is Nevada's equivalent of *Fed. Rule of Crim. Proc. 5(a)*. See R.A., Exhibit 2. Inasmuch as Powell was arrested by the Las Vegas Metropolitan Police Department, paragraph one of said statute is the pertinent section to this case. In essence, *Nev. Rev. Stat. 171.178(1)* provides that a person arrested with or without an arrest warrant shall be taken before the nearest available magistrate without unnecessary delay. In discussing this statute, the Nevada Supreme Court has stated in Sheriff v. Berman, 659 P.2d 298 (Nev. 1983):

> *NRS 171.178* affords an arrested person a statutory right to be brought before a magistrate "without unnecessary delay." It does not directly import the federal constitutional guarantee of a speedy trial, and does not require the same

> interpretation that federal courts have given the similarly-worded *Federal Rule of Criminal Procedure 5(a)*. (citations omitted).
>
> The purpose of the statute is to prevent law enforcement personnel from conducting a "secret interrogation of persons accused of crime." Morgan v. Sheriff, 92 Nev. 544, 546, 554 P.2d 733, 734 (1976), quoting McNabb v. United States, 318 U.S. 332, 344 (1943). Speedy arraignment is primarily intended to ensure that the accused is promptly informed of his privilege against self-incrimination. (citation omitted).

659 P.2d at 300.

The Court went on to note that the mere passage of time between arrest and arraignment does not alone establish a deprivation of a defendant's statutory right. Rather the defendant must establish that prejudice resulted from the fact of delay. Id. More recently, in Huebner v. State, 731 P.2d 1330 (Nev. 1987), the Court also noted that the purpose behind *Nev. Rev. Stat. 171.178* "is to prevent 'resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.' McNabb v. United States, 318 U.S. 332, 344 (1943); (Nevada citations omitted)."

Powell was arrested on November 3, 1989 and charged with child abuse with substantial bodily harm. The petitioner claims he made statements to police on November 3, 1989, and on November 7, 1989. The conversation on November 3rd occurred prior to arrest and thus was not custodial. The interview on November 7th was custodial but Defendant received the Miranda admonishment prior to making a state-

ment. R.A., Exhibit 3. Although the Nevada Supreme Court described this statement as being prejudicial, Powell's answers attempted to minimize his involvement with the child's injuries. Also on November 7, 1989, a magistrate concluded that probable cause for continued detention existed. R.A., Exhibit 4. This proceeding was done to conform to Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975). On November 8, 1989, an amended criminal complaint was filed charging Powell with murder. R.A., Exhibit 5.

Powell was formally arraigned on the murder charge on November 13, 1989. R.A., Exhibit 6. It is this time period from his arrest on November 3, 1989 until his formal arraignment on November 13, 1989 that Powell challenged as a violation of *Nev. Rev. Stat. 171.178*. Powell never claimed that his right to a timely determination of probable cause by a neutral and detached magistrate under Gerstein v. Pugh had been violated. Had such a challenge been made it most likely would have been denied because, prior to this Court's enunciation of the forty-eight hour time period in McLaughlin, there was no specific time period mandated by this Court or the Nevada Supreme Court.

Although no Gerstein issue was presented to the Nevada Supreme Court for review, the Court, sua sponte, brought the decision of County of Riverside v. McLaughlin, ____ U.S. ___, 111 S.Ct. 1661 (1991), into its discussion of Powell's speedy arraignment claim under *Nev. Rev. State 171.178*. It appears to the State that the Nevada Supreme Court confused Gerstein with speedy arraignment. For example, the Court

stated: "We initially note that the United States Supreme Court has provided additional guidance on the issue of what constitutes a timely initial appearance (emphasis added). See County of Riverside v. McLaughlin, ____ U.S. ____, 111 S.Ct. 1661, 114 L.Ed. 2d 49 (1991).

Later, the Court stated, "The McLaughlin case renders *Nev. Rev. Stat. 171.178(3)* unconstitutional insofar that it permits an initial appearance up to seventy-two hours after arrest . . . ." Powell at 924. But the "additional guidance" this Court was providing in McLaughlin pertained to the outside time limit for a Gerstein probable cause determination for persons arrested without a warrant, not for an initial appearance (arraignment), which applies to all persons arrested with or without a warrant. Although the procedure utilized by the Court of Riverside combined Gerstein probable cause determinations with initial appearances, the forty-eight hour period this Court enunciated applies to Gerstein probable cause determinations.

Thus, County of Riverside v. McLaughlin has no bearing on Nevada's speedy arraignment statute. It only applies to Gerstein probable cause determinations. Should Nevada do as Riverside County had done and combine both proceedings into one, then persons arrested without a warrant would be entitled to a probable cause determination and arraignment within forty-eight hours.

Because Powell only claimed a statutory violation of *Nev. Rev. Stat. 171.178*, McLaughlin was not relevant to the issue presented on appeal. Consequently, the Nevada Supreme

Court was not remiss for failing to conclude that Griffith v. Kentucky, 478 U.S. 314 (1987) required it to apply McLaughlin retroactively to Powell's case.

II

THIS COURT'S DECISION IN COUNTY OF RIVERSIDE V. McLAUGHLIN DID NOT DECLARE A NEW CONSTITUTIONAL RULE AND THEREFORE THE RETROACTIVITY ANALYSIS OF GRIFFITH V. KENTUCKY DOES NOT APPLY

While petitioner is correct that this Court adopted Justice Harlan's retroactivity analysis in Griffith v. Kentucky, supra, thereby discarding the three-prong analysis set forth in Tehan v. United States, 382 U.S. 406 (1966), Griffith states, "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. (emphasis added).

In Gerstein v. Pugh, supra, this Court held that the fourth amendment "requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest." McLaughlin, 111 S.Ct. at 1665. That case enunciated a newly declared constitutional rule of criminal procedure. In McLaughlin, however, no new constitutional rule was declared. All this Court did in McLaughlin was determine what "prompt" means in

terms of Gerstein. McLaughlin, supra, at 1665. Respondent submits that merely determining an appropriate time parameter to include in the Gerstein analysis does not constitute the declaration of a new constitutional rule of criminal procedure. The retroactivity analysis adopted in McLaughlin should therefore not be utilized. Thus, even if this Court should conclude that McLaughlin does have legal relevance to the issue Powell presented to the Supreme Court of Nevada, the holding of McLaughlin is not entitled to the generous retroactivity analysis set forth in Griffith, supra.

The three-prong test set forth in the footnote of the Powell opinion adequately protects the rights of criminal defendants when a new case does not articulate a new constitutional rule.

III

PETITIONER WAIVED HIS RIGHT TO A TIMELY ARRAIGNMENT WHEN HE WAS ADVISED OF HIS RIGHTS UNDER MIRANDA AND VOLUNTARILY WAIVED SAME

Assuming arguendo that McLaughlin is legally relevant to Powell's allegation that the State violated his statutory right to a speedy arraignment, that the retroactivity analysis adopted in Griffith v. Kentucky is the correct test to apply, and that the Nevada Supreme Court applied the wrong retroactivity analysis, Powell still fails to demonstrate that he is entitled to relief. He argues that the

Nevada Supreme Court failed to analyze Powell's direct appeal claim in light of McLaughlin. See Petition, p.3. His claim is based on the fact that, in footnote 1 of its opinion, the Nevada Supreme Court noted that the forty-eight hour period mandated by McLaughlin does not apply to Powell's case. Powell, 924, n.1.

Had that been the holding of the Nevada Supreme Court, then the discussion of Powell's claim would have ended right there and the contents of footnote 1 would probably have been in the body of the opinion. The Court would then have moved on to Powell's next issue, set forth at p. 925 under headnote 6. Instead, the Court, in three rather long paragraphs, explains why even if Powell's rights had been violated, he was still not entitled to relief. All of the Court's discussion under headnote 5 would be superfluous had the Court only relied on its opinion that McLaughlin was not retroactive to Powell's case.

Instead, the court, as an alternative argument, assumed Powell's speedy arraignment under *Nev. Rev. Stat. 171.178* had been violated and then explained that, because he had been given the Miranda warning and agreed to speak with the police officers, he thereby waived his right to a "seasonal arraignment." Powell at 924-925.

In so holding, the Court cited to Deutscher v. State, 601 P.2d 407 (Nev. 1979). That case cited to United States v. Indian Boy X, 565 F.2d 585 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978), United States v. Woods, 468 F.2d 1024 (9th Cir. 1972), cert. denied, 409 U.S. 1045 (1972), and

Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969), cert. denied 397 U.S. 1058 (1970). The reason for the rule is that because the primary purpose of an arraignment is to advise a defendant of his rights, a delay in arraignment is not prejudicial where a defendant has already been so advised. The Court also noted that Powell did not challenge the voluntariness of his statement to police. Powell at 925. Therefore, the rule enunciated in Deutscher, supra, was appropriately applied in Powell.

Petitioner dismissed the Nevada Supreme Court's waiver analysis by arguing that his detention had become illegal before his waiver was obtained. Petition, p.4, fn. 2. But Powell, on direct appeal, was not arguing a constitutional violation under Gerstein. He only complained of a statutory violation of his right to a speedy arraignment. Had Powell raised a Gerstein violation prior to the time he gave a voluntary statement to the police, his remedy, had he prevailed, would only have been release from custody, not dismissal of the case.

Powell's Gerstein probable cause determination occurred on the same day he gave his statement to the police. Once the magistrate found probable cause for continued detention, any Gerstein error was cured. Thus, by Tuesday, November 7, 1989, after his Mirandized statement and the magistrate's probable cause Gerstein determination, Powell had neither a Gerstein violation nor a speedy arraignment argument to make.

CONCLUSION

Petitioner had failed to show that there is any valid constitutional basis upon which this Court should invoke its discretionary jurisdiction. His Petition for Writ of Certiorari should be denied.

Dated this 26th day of July, 1993.

Respectfully submitted,

REX BELL
Clark County District Attorney

By _____
JAMES TUFTELAND
Chief Deputy
Attorney for Respondent

ORIGINAL

FILED
AUG 6 1990
OFFICE OF THE CLERK

ORIGINAL

UNITED STATES

THE STATE OF NEVADA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEVADA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

The arguments raised in Respondent's Brief in Opposition to the Petition for Certiorari are essentially misdirected, and they do nothing to refute Petitioner's claim that this Court's intervention is necessary to require the Nevada courts to follow binding constitutional precedent.

1. Respondent argues that Petitioner's claim in the Nevada Supreme Court related only to the delay in his arraignment and that County of Riverside v. McLaughlin, ___ U.S. ____, 111 S.Ct. 1661 (1991) is therefore irrelevant. Respondent does not dispute the fact that the Nevada Supreme Court has, and exercises, the power to review plain errors and to review issues on appeal sua sponte. E.g., Nev. Sup. Ct. Rule 250(IV)(I); Nev. Rev. Stats. § 47.040(2). The Nevada Supreme Court in fact reviewed the issue of the delay in Petitioner's probable cause determination, to which McLaughlin is clearly relevant, and its disposition of that issue must be controlled by the standards imposed by this Court in McLaughlin and Griffith v. Kentucky, 479 U.S. 314 (1987), regardless of how the issue came before it. In short, having chosen to review the issue, the Nevada Supreme Court was bound to decide it in conformity with the Constitution.

Respondent does not dispute the fact that Petitioner was arrested without a warrant and did not receive a probable cause determination within the time mandated by McLaughlin. Since Petitioner's case was pending on direct appeal when McLaughlin was decided, the standard it imposed must be applied here.

2. Respondent makes the peculiar argument that McLaughlin did not impose a new constitutional rule and therefore Griffith v. Kentucky does not require that it be applied to cases pending on direct appeal. Griffith, of course, requires what a new constitutional rule which is a "clear break" from precedent be applied in all cases pending on direct appeal; but it was already the law, before Griffith, that cases which merely imposed a rule following from existing precedent had to be so applied. Id. at 324-325. Respondent's argument on this point amounts to a confession of error.

3. Respondent's argument based on the Nevada Supreme Court's discussion of waiver of prompt arraignment under the Nevada statute is entirely beside the point. Whether or not the Nevada Supreme Court found that Petitioner's statutory right to a timely arraignment was waived does not affect the issue presented here, which is based upon the constitutional right to a prompt probable cause determination.[1] Here,

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[1]Respondent may be attempting to imply that Petitioner should be deemed to have waived his federal constitutional right to a prompt probable cause determination, as a result of an implied waiver of his state statutory right to a prompt arraignment. This position is untenable. The rights protected by the giving of Miranda warnings are Fifth and Sixth Amendment interests, while the right to a prompt probable cause determination is a Fourth Amendment right. This Court recently held that invocation of constitutional rights proceeds on an amendment-by-amendment basis. McNeil v. Wisconsin, ___ U.S. ___, 111 S.Ct. 2204, 2208-2210 (1991). The same rule must be true for purported waivers of constitutional rights, and there is nothing in the record remotely suggesting that Petitioner ever knowingly and intelligently waived his right to a constitutionally-prompt probable cause determination. Further, the constitutional violation was complete before Petitioner received Miranda warnings and made a statement. Whatever the effect of the Miranda waiver may be, it certainly cannot constitute an ex post facto, uncounselled waiver of a claim based upon a constitutional violation which has already occurred.

Respondent's waiver theory is also unsound on the merits. It is based upon Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969), cert denied 397 U.S. 1058 (1970), in which the court rejected a defendant's claim that his arraignment was unreasonably delayed during the time he was actually giving a statement to the police. At

as in McLaughlin, the arraignment and probable cause determination were apparently combined, but this does not affect the fact that each determination involves distinct issues.

4. Nothing in Respondent's opposition contests the basic facts relied upon by Petitioner. Petitioner was arrested without a warrant and was not given a probable cause determination within the time prescribed by McLaughlin. The constitutional violation was addressed and acknowledged on the merits by the Nevada Supreme Court's decision; but the relief to which Petitioner was entitled was denied to him because the court failed to apply McLaughlin to his case. The Nevada Supreme Court's failure to apply McLaughlin to Petitioner's case, which was pending on direct appeal at the time McLaughlin was decided, violated Petitioner's right to equal protection of the laws under Griffith v. Kentucky.

The Nevada Supreme Court's decision here presents a clear and present danger of denying the benefit of McLaughlin to all state defendants whose cases are pending on appeal and of substantially confusing the federal law of retroactivity in this jurisdiction, in addition to denying Petitioner his constitutional rights in this case. This Court's continual restriction of the availability of federal collateral review has been based upon the assumption that state courts not act in this fashion, because they will in fact follow this Court's binding precedents. When, as here, that assumption

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most, Pettyjohn legitimately stands only for the proposition that a waiver of Miranda rights waives a claim of unreasonable delay in arraignment for the time it takes to obtain the Mirandized statement. Its extension in other cases, to allow postponing an arraignment indefinitely once a suspect has waived Miranda rights and made a statement, is completely unjustifiable.

has proven incorrect, this Court cannot shirk its duty to provide a remedy itself. In this case, the burden to this Court of providing that remedy is de minimis, while the necessity of providing it is great.

CONCLUSION

For the reasons stated above and in the petition, we submit that this Court should grant a writ of certiorari, vacate the judgment and remand the case to the Nevada Supreme Court for reconsideration in light of Griffith v. Kentucky.

Dated this 6th day of August, 1993.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 92-8841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KITRICH POWELL,
Petitioner

v.

THE STATE OF NEVADA

On Writ of Certiorari to the Supreme Court of Nevada

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 24, 1993
CERTIORARI GRANTED OCTOBER 4, 1993

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CHRONOLOGICAL LIST OF RELEVANT DATES

DATE	PROCEEDINGS
November 3, 1989	Petitioner arrested for violation of Nev. Rev. Stats. § 200.508 (child abuse)
November 7, 1989	Probable cause determination made by Justice Court, Las Vegas Township
November 8, 1989	Criminal complaint filed, charging violation of Nev. Rev. Stats. § 200.508
November 13, 1989	Initial arraignment
November 16, 1989	Amended criminal complaint filed, charging violation of Nev. Rev. Stats. §§ 200.010, 200.030 (murder)
May 1, 1991	Jury verdict finding petitioner guilty
May 11, 1991	Jury verdict sentencing petitioner to death
June 10, 1991	Judgment imposing sentence of death filed by Eighth Judicial District Court, Clark County, Nevada
September 3, 1992	Decision affirming conviction and sentence on appeal filed by Supreme Court of Nevada
February 23, 1993	Order denying rehearing filed by Supreme Court of Nevada

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 22348

KITRICH POWELL,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

September 3, 1992

OPINION

Per Curiam:

A jury convicted appellant Kitrich Powell (Powell) of first degree murder in the death of four-year-old Melea Allen (Melea). Powell had subjected the child to repeated beatings which resulted in a variety of injuries, one of which caused her death. Powell was sentenced to death following a penalty hearing. For the following reasons, we affirm both the conviction and the sentence.

Facts

Powell met Sharon Allen and her three children in September 1989 at a Salvation Army shelter in Las Vegas, Nevada. The Allens and Powell then moved in and out of several apartments and motels for the next two months. During this period, Mrs. Allen worked at Deseret Industries from 8:30 a.m. until 5:00 p.m. Powell stayed home and took care of Melea while the older children were at school and Mrs. Allen was at work.

Neighbors noticed that Melea had bruises on her face and legs, a cut chin and that one of her eyes was quite red. On one occasion, a neighbor heard Melea screaming and crying. When he saw Melea approximately one and one-half hours later, he noticed new bruises on her face and legs which had not been there the night before. In the neighbor's presence, Powell asked Melea how she had gotten hurt, and she answered: "Daddy, you did it." Powell then said, "No, baby, remember you fell in the tub, remember?" Powell and Melea repeated this conversation a couple of times.

The testimony at trial indicated that Powell cruelly teased Melea and mistreated her physically in the presence of others. On the evening of November 2, 1989, Melea was quiet and inactive. She could not move her head and was complaining of head and neck pain. The left side of her head was soft and spungy, and she had a new bruise on her forehead. She told her mother and siblings that "Daddy" (Powell) had dropped her on her head when he was lifting her over his shoulder. Melea was not taken to a hospital by either Powell or Mrs. Allen on the day these new injuries occurred.

The next morning, November 3, 1989, Melea could not hold up her head and could not walk without assistance. Mrs. Allen went to work as usual, and Powell delayed seeking medical treatment for Melea until late that morning. By the time Melea was admitted to the emergency room of the hospital, she was unconscious and in critical condition. An examination of the comatose child revealed a deep laceration on her chin, which was in the process of healing, and a number of bruises which were in different stages of healing. Melea's buttocks showed a pattern of several injuries on top of one another. She had extensive bruising all over her body and her spine was fractured. Melea's head showed evidence of several injuries. The most recent and severe injury had caused her brain to swell and was the cause

of the coma. Melea's head injury was most likely caused by a blunt trauma which carried considerable force. The State's expert witness, Dr. Richard Krugman, testified that in the last three years he had seen only one head injury which was similar to Melea's. That injury resulted from an adolescent being propelled off the top of a pick-up truck at forty-five miles per hour onto a concrete surface. Melea's injuries suggested a repetitive pattern of daily injury. All three physicians who testified agreed that Melea's injuries were not the result of accidents and that Melea had been subjected to severe abuse for some time. Without regaining consciousness, Melea died from the head injury on November 8, 1989.

Originally, Powell was arrested and charged with child abuse with substantial bodily harm (NRS 200.508). Shortly after Melea's death, Powell was additionally charged with murder (NRS 200.010; NRS 200.030). Following a jury trial, Powell was found guilty of murder in the first degree. Following a penalty hearing, the jury imposed a sentence of death. This appeal followed. On appeal, Powell asserts several assignments of error, which we now address.

Delay in Appearing Before a Magistrate

Powell argues that he was not brought before a magistrate within seventy-two hours as required by NRS 171.178(3). NRS 171.178(3) provides:

> 3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:
>
> (a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and
>
> (b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.

The purpose of NRS 171.178 is to prevent the police from resorting to secret interrogations and coercive tactics. Huebner v. State, 103 Nev. 29, 32, 731 P.2d 1330, 1333 (1987). This court has repeatedly held that the defendant must show prejudice which resulted from the delay. *See e.g., Id.* at 32, 731 P.2d at 1333; Morgan v. Sheriff, 92 Nev. 544, 546, 554 P.2d 733, 734 (1976).

Powell was arrested on Friday, November 3, 1989. A magistrate found probable cause to hold Powell for a preliminary hearing on Tuesday, November 7, 1989. It is unclear from the record whether Powell was present before the magistrate on this day. Powell contends that he was not brought before a magistrate until November 13, 1989. On November 3, 1989, and November 7, 1989, prior to his initial appearance, Powell made statements to the police. He admitted to spanking Melea for wetting her pants and slapping her on other occasions. Powell told officials that he never intended to hurt "the baby." These statements, which were presented to the jury, were clearly prejudicial to Powell.

We initially note that the United States Supreme Court has provided additional guidance on the issue of what constitutes a timely initial appearance. *See* County of Riverside v. McLaughlin, 111 S.Ct. 1661 (1991). In *McLaughlin*, the Court stated that the Fourth Amendment allows for a reasonable delay of a probable cause determination while authorities are processing suspects through the criminal justice system. *Id.* at 1669. The Court then went on to state that a judicial determination of probable cause within forty-eight hours of arrest comports with the promptness requirement set forth in Gerstein v. Pugh, 420 U.S. 103 (1975). *McLaughlin*, 111 S.Ct. at 1670. Intervening weekends (and implicitly, holidays or other non-judicial delays) are included in the calculation of forty-eight hours. *Id.* If the suspect does not receive a probable cause determination within forty-

eight hours, the State must prove that the delay was due to a bona fide emergency or other extraordinary circumstances. *Id.*

The *McLaughlin* case renders NRS 171.178(3) unconstitutional insofar that it permits an initial appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours. Based on *McLaughlin*, we hold that a suspect must come before a magistrate within forty-eight hours, including non-judicial days, for a probable cause determination.[1]

However, the analysis of whether or not Powell's rights were violated does not end with the mere facts of a delay and incriminating statements. We have previously held that an accused waives his right to a seasonal arraignment when he voluntarily waives his right to remain silent. Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979), *vacated on other grounds*, 111 S.Ct. 1678 (1991). There, we stated:

> We subscribe to the rule of law which provides that when an accused voluntarily waives his right to

[1] It is important to note that the forty-eight hour requirement mandated by *McLaughlin* does not apply to the case at hand. When a case announces a new rule of law, the application of the rule is prospective unless it is a rule of constitutional law; and then it is only applied retroactively under certain circumstances. Gier v. District Court, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990). The factors to be weighed in determining retroactivity are: "(1) the purpose of the rule; (2) the reliance on prior, contrary law; and (3) the effect retroactive application would have on the administration of justice." Franklin v. State, 98 Nev. 266, 269 n.2, 646 P.2d 543, 545 n.2 (1982) (citing Tehan v. United States, 382 U.S. 406 (1966)).

We conclude that the new rule announced in *McLaughlin* would not apply retroactively, if only for the monumental negative impact which retroactive application would have on the administration of justice in Nevada. Were *McLaughlin* to be applied retroactively, untold numbers of prisoners would be set free because they were not brought before a magistrate within forty-eight hours.

> silence and his right to counsel, he concurrently waives his right to be seasonably arraigned. The reason for this rule is that the primary purpose of an arraignment is to inform the defendant of his rights. But a delay in arraignment is not prejudical when a defendant has already been advised of his rights, was promptly so advised, and voluntarily waived his rights. This is particularly so when the delay is not flagrant and the record is silent relative to any other irregularities which go to the issue of voluntariness.

Id. at 680, 601 P.2d at 414 (citations omitted).

Powell does not challenge the voluntariness of his statements, nor is there any indication in the record that the statements were involuntary. During the first interview on November 3, 1989, prior to being formally arrested, Powell left the interview twice in order to smoke a cigarette. Powell's conduct indicates that he felt free to leave the interview at any time and that he was not coerced or involuntarily detained in any way. On November 7, 1989, Powell was read his Miranda rights prior to the interview, and he waived those rights. There is no indication that the waiver was involuntary.

Irrespective of when Powell was brought before a magistrate, he waived his right to remain silent and his right to counsel. By waiving those rights, he thereby waived his right to a timely arraignment. *Deutscher*, 95 Nev. at 680, 601 P.2d at 414. The same reasoning this court employed in *Deutscher* applies to the requirement of an initial appearance before a magistrate within the prescribed time limit. At the initial appearance, Powell would have been advised, *inter alia*, of the right to counsel and the right to remain silent. NRS 171.186.[2] One of the purposes of

[2] NRS 171.186 prescribes the rights of the defendant prior to a preliminary hearing. NRS 171.186 provides:

> The magistrate or master shall inform the defendant of the complaint against him and of any affidavit filed therewith, of

a speedy arraignment is to ensure that the suspect is informed of his Fifth Amendment right against self-incrimination. Huebner v. State, 103 Nev. 29, 32, 731 P.2d 1330, 1333 (1987). The same is true of a timely first appearance. Powell was advised of his rights on November 7, 1989, when he gave a statement to the police, and he voluntarily waived those rights. We therefore conclude that by waiving his right to remain silent and his right to counsel, Powell waived his right to an appearance before a magistrate within seventy-two hours.

Evidence of a Prior Bad Act in the Guilt Phase

Melea's fourteen-year-old sister, Melinda, testified that prior to trial, Powell asked her to lie for him at trial and that he repeatedly made harassing phone calls to her. Powell told her that he had killed Melea and threatened Melinda by saying that she "was next." Prior to Melinda's testimony, defense counsel moved to exclude the statement regarding the threat, because it constituted proof of another crime. The State offered the statement as proof of Powell's intent to kill Melea. NRS 48.045(2).[3] The district court denied the motion, stating that there was no showing of unfair prejudice, confusion of the issues or

his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel, and shall admit the defendant to bail as provided in this Title.

[3] NRS 48.045(2) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

misleading the jury if the testimony were allowed. The decision to admit or exclude evidence, after balancing the prejudicial effect with the probative value, is within the discretion of the trial judge. Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985); *see also* NRS 48.035(1) and (2).[4] The trial court's determination will not be overturned absent manifest error. *Petrocelli,* 101 Nev. at 52, 692 P.2d at 508.

We conclude that the district court did not abuse its discretion in allowing the threat to be presented to the jury. The testimony was admissible under NRS 48.045 as proof of intent to kill Melea, as well as the "complete story of the crime" doctrine. That doctrine provides that under certain circumstances, evidence of another crime may be introduced at trial when the other crime is interconnected to the act in question such that a witness cannot describe the act in controversy without referring to the other crime. *See* NRS 48.035(3);[5] Cirillo v. State, 96 Nev. 489, 493, 611 P.2d 1093, 1095 (1980). The doctrine is applicable in this case. Here, Melinda could not describe Powell's admission that he had murdered Melea without describing the context in which the statement was made. Otherwise, the jury would have had no

[4] 48.035 Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence. . . .

[5] NRS 48.035(3) provides in relevant part:

Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded . . . .

idea why Powell would "confess" to a fourteen-year-old child.

Guilt Phase Jury Instructions on Willfulness, Deliberateness and Premeditation

Powell contends that the jury was not provided with an instruction defining "willful" or "deliberate" and that in the absence of such definitions, the jury was misled to believe that the State was only required to prove that Powell acted with premeditation.

Powell asserts that Jury Instruction No. 9 was incomplete because it merely defined premeditation. Jury Instruction No. 9 provided:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Powell contends that this instruction directed the jury that if it found premeditation, it was to automatically find willfulness and deliberation as well.

In Briano v. State, 94 Nev. 422, 581 P.2d 5 (1978), this court referred to "deliberate and premeditated" as a single term and not separate elements requiring separate thought processes. We recently considered deliberateness in DePasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990), *cert. denied*, 112 S.Ct. 99 (1991). There, we stated:

> Premeditation and deliberation can be inferred from the nature and extent of the injuries, coupled with repeated blows. Given the brutal and extensive nature of Mr. Cane's injuries (including injuries to the head, torso, ribs and back), an inference of premeditation and deliberation can be reasonably drawn. This is particularly true when considering the metal rod which was inserted deeply into the victim's ear. It is difficult to imagine such a process occurring without deliberate thought.

Id. at 848, 803 P.2d at 221. In *DePasquale*, as in *Briano*, we used the terms premeditated and deliberate as a single term.

Other jurisdictions have held that the terms deliberate, premeditated and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death to result. *See* Sanders v. State, 392 So.2d 1280, 1282 (Ala.Crim.App. 1981) (the terms premeditation and deliberation may be grouped together under the phrase "formed design"); People v. Fusselman, 46 Cal.App.3d 289, 299 (Cal.Ct.App. 1975) (distinguishing malice aforethought from the phrase "willful, deliberate and premeditated"; the latter phrase indicates a frame of mind in which the actor weighs the course of action and chooses to kill); Fuller v. State, 413 A.2d 277, 280 (Md.Ct.Spec.App. 1980) (the trilogy of terms "willful, deliberate and premeditated" connote the same general idea of the intention to kill); Comonwealth v. Nelson, 523 A.2d 728, 732 (Pa. 1987) (a willful, deliberate and premeditated killing is one where the actor has specific intent to bring about the death of the victim). In *Fuller*, the Maryland Court of Special Appeals queried whether the three adjectives described three different aspects of the mental state of intent to kill or whether the terms were simply a rhetorical expression used for emphasis. *Fuller*, 413 A.2d at 280. The court went on to

ask if the act could be willful (a specific design and purpose to kill) without simultaneously being deliberate (conscious knowledge of the purpose to kill). *Id.* We agree with the Maryland court when it stated: "The trilogy of terms connotes the same general idea—the intention to kill. The use of all three words would seem to us to serve no purpose other than to shroud the intention in an aura of redundancy so as to convey the seriousness of the matter." *Id.* at 380 (quoting Brown v. State, 410 A.2d 17, 22 (Md.Ct.App. 1979)).

We have set forth the requirement for premeditation in Briano v. State, 94 Nev. 422, 581 P.2d 5 (1978), where we stated "[T]he state must prove that a design to kill was distinctly and rationally formed in the mind of the perpetrator, at or before the time the fatal blows were struck. . . . [I]t [does not] matter how short a time existed between the formation of the design to kill and the killing itself." *Id.* at 425, 581 P.2d at 7. As long as the instruction on premeditation which is given to the jury comports with *Briano*, it is not necessary to separately define deliberateness or willfulness. The instruction on premeditation which was given to the jury in the case at hand was an accurate definition. We therefore conclude that Powell's argument has no merit.

Guilt Phase Instruction on What Constitutes Evidence of Willfulness, Premeditation and Deliberation

Powell takes exception to Jury Instruction No. 10, arguing that it constituted an impermissible comment on the evidence by the court because it instructed the jury what evidence it could consider to show willfulness and deliberateness. The instruction read: "The nature and extent of the injuries, coupled with repeated blows, may constitute evidence of willfulness, premeditation and deliberation."

This court has sanctioned a finding of premeditation and deliberation inferred from the circumstances of the

killing in several cases. *See e.g.*, DePasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990); Hern v. State, 97 Nev. 529, 635 P.2d 278 (1981); Curtis v. State, 93 Nev. 504, 568 P.2d 583 (1977). In fact, in *DePasquale*, this court used language nearly identical to the instruction about which Powell complains. There, we stated that "[p]remeditation and deliberation can be inferred from the nature and extent of the injuries, coupled with repeated blows." *DePasquale*, 106 Nev. at 848, 803 P.2d at 221. The jury instruction did not, therefore, constitute an impermissible comment on the evidence.

Powell's Appearance in Shackles During the Penalty Phase

During both the guilt phase and the penalty phase of the trial, Powell exhibited disruptive and threatening behavior. The first outburst by Powell occurred during the guilt phase of the trial when one of the prosecutors informed the court that Powell had made derogatory remarks regarding a witness' sexual preference as the witness was walking to the stand. The judge declined to make a direct order, because he had not heard the comments himself. The judge suggested that defense counsel speak to Powell, whereupon Powell stated, "Mr. Seaton has commented on me and f---- me in my a-- two or three different times since I have been in [the] courtroom now. Now, that's out of line. Now, you admonish him because of his outrageous behavior." The judge then enjoined everyone from making any personal comments about any of the parties, counsel or any other officers of the court. Within minutes, one of the prosecutors informed the court that Powell was making inappropriate comments, which were not specified, to the prosecutors. Powell was admonished again.[6]

[6] We note that this entire interchange was outside the presence of the jury.

During the penalty phase of the trial, Powell angrily interrupted the testimony of a former neighbor, accusing the witness of lying. The court recessed early for lunch, admonishing Powell to "cool off." After court resumed, but before the jury was brought in, the court stated:

> We observed, for the record, that Mr. Powell reacted angrily to the testimony of his former neighbor, Bob Yoho, the individual who knew him from his home town. Rather than allow the defendant to continue with his verbal outburst, the court took a recess for lunch. . . . Now, for the record, we have had some additional developments since we broke for lunch; is that correct?

The bailiff then informed the court that when Powell was told he would remain in leg shackles (as apparently had been decided in chambers), he looked at the officers and said, "What are you looking at, you pig scumbag," and "Before this is over I'll get one of you. Take off your badge and your gun, I'll whip your a--," and "I am quicker than I seem to be," or "I'm quicker than I appear." The bailiff told the court that Powell went on to say "Before this is over, I'll get your eye, I'll take your eye." One of the prosecutors informed the court that when she came back from the lunch break, Powell made remarks to her of a sexual nature, and stated, "If they want to see violence, I'll show them violence." The court ordered Powell to be put in leg and arm restraints for the remainder of the penalty phase.

Later in the penalty phase, defense counsel requested that the shackles be removed prior to Powell testifying in order to avoid prejudicing the jury. The court ordered Powell to remain in hand and leg shackles, explaining that the ruling was based on Powell's outbursts and his "hair-trigger temper" which resulted in the need to protect the safety of the jury and court personnel. The defense then requested alternatively that Powell be unshackled but accompanied by law enforcement personnel while he was on

the witness stand. The court asked the bailiff if that arrangement was acceptable to him, and the bailiff indicated that he thought Powell should be in leg shackles because of the close proximity of the witness stand to the bench and the jury. The court then ruled that Powell's hands and arms would be unshackled but that the leg-shackles would remain. The leg shackles could not be seen by the jury while Powell was on the witness stand. During Powell's testimony, the bailiff sat in the jury box.

Powell asserts that it was error for the district court to force him to appear in shackles during the penalty phase of the trial and to be accompanied by law enforcement personnel.

The standard for restraint during the penalty phase is elucidated in Duckett v. State, 104 Nev. 6, 752 P.2d 752 (1988). In *Duckett*, this court stated that the right of a defendant to be free from shackles during the guilt phase of the trial is designed to protect the presumption of innocence. *Id.* at 11, 752 P.2d at 755. During the penalty phase, there is no longer a presumption of innocence and therefore the constitutional guarantee to be free of prison garb and shackles no longer exists. *Id.* During the penalty phase, public safety concerns are to be afforded greater significance. *Id.* The decision concerning restraint of the defendant during the penalty phase of the trial is within the sound discretion of the trial court, after balancing the state's interests for safety against the interests of the defendant. *Id.* The court's decision will not be overturned absent an abuse of discretion. *Id.*

In *Duckett*, this court stated that the defendant stood convicted of a brutal murder of two people, for which the death penalty could be imposed, and he "might have concluded that he had nothing to lose from further acts of violence." *Id.* at 12, 752 P.2d at 755. The facts in this case demonstrate an even greater need for security than the facts in *Duckett*. Here, Powell threatened to poke out the eyes of law enforcement officers, made sexual remarks

to a prosecutor, harassed a witness and threatened to "show [the court] violence." We hold that it was not an abuse of discretion to shackle Powell during the penalty phase of the trial.

Delegation of Discretion to the Bailiff

Powell also argues that the district court erred in delegating its discretion with regard to security measures to the bailiff. Powell asserts that it was error for the district court to ask the bailiff if it was acceptable to him that Powell be unshackled while on the witness stand.

When exercising discretion in restraining the defendant, a trial judge has the right to give heed to an officer of the court's knowledge regarding the defendant's record, characteristics and tendencies. State v. McKay, 63 Nev. 118, 157, 165 P.2d 389, 406 (1946). The trial judge may also consider the officer's recommendation. *Id.*

The record clearly indicates that the court was exercising its own discretion in determining which method of restraint was appropriate under the circumstances and merely consulted the bailiff for his opinion. We note that the court also considered the wishes of both defense counsel and the prosecution. The bailiff was the officer who heard the defendant threaten to poke out an officer's eye. The bailiff clearly had knowledge of Powell's tendencies and characteristics, and the district court was entitled to consider the bailiff's knowledge. We therefore find no merit in Powell's contention.

Evidence of a Prior Bad Act in the Penalty Phase

During the penalty phase of the trial, Thomas Kucera (Kucera) testified that he formerly ran a halfway house for parolees and that Powell stayed there in early 1989. After Powell had been at the halfway house for two weeks, Kucera's twelve-year-old daughter informed him that Powell had molested her, whereupon Kucera told Powell to move out. Kucera telephoned Powell's probation

officer to report the incident while Powell was present. Powell then said angrily, "I am going to kill you. No, I am not going to do it. I will have somebody else do it." The trial court allowed the testimony, finding that the probative value of the evidence outweighed the prejudice to Powell.

Powell asserts that the testimony of the molestation should not have been admitted, as it was more prejudicial than probative. *See* NRS 48.035(1). Powell argues that the testimony of the death threat could have been introduced without the reference to the molestation and that the testimony created an impression in the jury's mind that Powell had a pattern of mistreating young girls.

During a penalty hearing, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." NRS 175.552. This court has previously sanctioned the admission of testimony during a penalty hearing regarding an attempted sexual assault. Biondi v. State, 101 Nev. 252, 699 P.2d 1062 (1985). In *Biondi*, this court held that character evidence which is neither dubious nor tenuous is properly admitted during the penalty hearing. *Id.* at 257, 699 P.2d at 1065-66. Testimony regarding sexual assault is relevant to the defendant's character. *Id.* Powell fails to make any argument as to how Kucera's testimony was not credible. Further, the testimony regarding the molestation was an integral part of explaining the death threat against Kucera. We therefore conclude that the district court was within the range of its discretion in finding the testimony was more probative than prejudicial.

"Anti-sympathy" Jury Instruction

Part of Jury Instruction No. 12, which was given during the penalty phase, read: "A verdict may never be influenced by sympathy, prejudice or public opinion. Your

decision should be the product of sincere judgment and sound discretion in accordance with these rules of law."

Powell argues that a reasonable juror could interpret the language as an instruction to discard mercy and compassion as well as the mitigating circumstances in sentencing him.

Powell's contention is without merit. In Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991), we stated, "This court has previously ruled that it is not error to instruct the jury not to be influenced by sympathy if the court also instructs the jury to consider mitigating circumstances." *Id.* at 215, 808 P.2d at 557 (citations omitted). Here, the jury was instructed to consider mitigating circumstances. Based on our holding in *Riley*, it was not error to give this instruction.

Instruction on "Any Other Mitigating Circumstances"

The jury was instructed on mitigating circumstances in Jury Instruction No. 8, which provides in relevant part:

> Murder of the First Degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime;
>
> . . . .
>
> 8. Any other mitigating circumstances.

Powell takes exception with the phrase "any other mitigating circumstances." Powell argues that this "catch-all" language fails to provide the jury with specific guidelines for considering mitigating evidence of his background and character.

This court considered the exact same argument in Flanagan v. State, 107 Nev. 243, 810 P.2d 759 (1991), *vacated on other grounds*, 112 S.Ct. 1461 (1992). There this court stated:

> [A] reasonable juror would conclude that mitigation was not restricted to crime-related factors because it was stated that the mitigating circumstances did *not* have to constitute a defense or reduce the degree of the crime. Furthermore, the jury in fact found two of the three mitigating circumstances to exist. In addition, the instruction as a whole adequately informed the jury of its right and duty to consider mitigating evidence. Finally, it is highly unlikely that a different outcome would have resulted from more specific instructions, given that the evidence of aggravating circumstances was overwhelming and clearly outweighed the mitigating circumstances found by the jury. Thus, we conclude that Instruction 8 did not violate the Eighth Amendment by impermissibly limiting the jury's consideration of mitigation to evidence related to the crime.

Id. at 249, 810 P.2d at 762-63. (Emphasis in original.)

Here, the jury was similarly instructed that it could find a mitigating circumstance even though that circumstance was not sufficient to constitute a defense or reduce the degree of the crime. The jury also found four aggravating circumstances and *no* mitigating circumstances; the aggravating circumstances obviously outweighed the mitigating circumstances. In light of *Flanagan*, Powell's argument is without merit.

NRS 177.055 Considerations

This court must consider the certain issues in all cases where the death penalty is imposed under NRS 177.055. NRS 177.055 provides in relevant part:

> 2. [T]he sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding if an appeal is taken:
>
> . . . .

(b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;

(c) Whether the sentence of death was imposed under the influence of passion, prejudice, or any arbitrary factor; and

(d) Whether the sentence of death is excessive, considering both the crime and the defendant.

We will discuss each of these issues in turn.

The evidence clearly supported the finding of the aggravating circumstances in this case. NRS 177.055(2)(b). Powell was under a sentence of imprisonment for three crimes: robbery with a firearm and two counts of second degree burglary (aggravating circumstances under NRS 200.033(1)). Further, the evidence which was admitted at the penalty hearing firmly established that Powell had previously been convicted of a felony involving the use or threat of violence to another: robbery with a firearm (aggravating circumstance under NRS 200.033(2)).

We have examined the record and conclude that the sentence was not imposed under the influence of passion, prejudice or any arbitrary factor. NRS 177.055(2)(c). We also conclude that the sentence of death is not excessive. Over time, Powell repeatedly subjected four-year-old Melea to brutal beatings, one of which eventually took her life. Every surface of the child's body was covered with injuries, literally head to toe. She had suffered several head injuries and her spine was fractured. Further, at the penalty hearing, only one witness appeared on Powell's behalf. The defense investigator who contacted Powell's family and friends indicated that he was unable to find one person who had "anything good to say" about Powell. We therefore conclude that given the crime and the defendant, the sentence of death was not excessive. NRS 177.055(2)(d).

Conclusion

We have considered Powell's remaining allegations of error and find them to be without merit. Consequently, we affirm the judgment against him and the sentence of death.

MOWBRAY, C. J.

SPRINGER, J.

ROSE, J.

STEFFEN, J.

YOUNG, J.

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 22348

KITRICH POWELL,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

ORDER DENYING REHEARING

[Filed Feb. 23, 1993]

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

/s/ Rose
ROSE
C.J.

/s/ Steffen
STEFFEN
J.

/s/ Young
YOUNG
J.

/s/ Springer
SPRINGER
J.

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[1] We deny all pending motions. The Honorable Miriam Shearing, Justice, did not participate in the decision of this appeal.

SUPREME COURT OF THE UNITED STATES

No. 92-8841

KITRICH POWELL,
Petitioner

v.

NEVADA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply.

October 4, 1993

Supreme Court, U.S.
FILED
NOV 15 1993
OFFICE OF THE CLERK

No. 92-8841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KITRICH POWELL,
Petitioner,

v.

NEVADA,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Consistent with *Griffith v. Kentucky*, 479 U.S. 314 (1987) and the Supremacy Clause, when a state court reaches and decides a federal constitutional question in a criminal case which is pending on direct appeal, can it decline to give the benefit of its decision to the aggrieved party in the case before it.

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BRIEF FOR PETITIONER

Petitioner Kitrich Powell respectfully prays that this Court reverse the judgment of the Supreme Court of Nevada affirming his conviction and sentence of death.[1]

OPINIONS BELOW

The opinion of the Nevada Supreme Court is published as *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992). The order denying petitioner's timely petition for rehearing is unpublished. JA 22.[2]

JURISDICTION

The decision of the Supreme Court of Nevada affirming petitioner's conviction and sentence was filed on Septemper 3, 1992. A timely petition for rehearing was denied on February 23, 1993. On May 24, 1993, the petition for certiorari was filed, and this Court granted the petition on October 4, 1993. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 6 of the United States Constitution provides, in pertinent part:

> "This Constitution . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

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[1] There are no parties to this proceeding other than those stated in the caption.

[2] ROA refers to the record on appeal in the Supreme Court of Nevada, and JA refers to the Joint Appendix.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 3, 1989, petitioner Kitrich Powell brought Melea Allen, the child of his girlfriend, to the emergency room at the University Medical Center in Las Vegas. The child was unconscious by the time she was checked into the hospital. While at the hospital that day, petitioner was interrogated by a police officer and arrested without a warrant for violating Nev. Rev. Stats. § 200.508 (child abuse). ROA 11, 3133, 3144-3146, 3606-3608. Petitioner remained in custody and on November 7, 1989, he was given warnings pursuant to *Miranda v. Arizona*, 386 U.S. 434 (1966) and interrogated again. Petitioner gave a statement which was admitted at trial. ROA 3630, 3663-3679. No judicial officer reviewed the legality of petitioner's arrest or detention before November 7, 1989. ROA 11.[3]

Melea Allen died in the hospital, and petitioner was charged with, and convicted of, first degree murder. ROA 30, 4098. He was sentenced to death on June 10, 1991.

[3] An element of confusion exists with respect to the actual date of the probable cause review. The signature of the justice of the peace on the warrantless arrest form is undated. The form has a stamped date of November 7, 1989, in the space marked "first appearance." ROA 11. The minutes of the justice court, however, do not show an initial appearance until November 13, 1989, ROA 4, and no complaint was on file until November 8, 1989. ROA 5. The Nevada Supreme Court noted the confusion as to when petitioner was first brought before the magistrate but it assumed that the probable cause review took place on November 7, 1989. JA 5; 838 P.2d at 924. In this brief, petitioner will refer to the date of the probable cause review as no earlier than November 7, 1989.

ROA 4798, 4849. On direct appeal, the Supreme Court of Nevada, sua sponte, considered the issue of unreasonable delay in the probable cause determination, in light of this Court's intervening decision in *County of Riverside v. McLaughlin*, —— U.S. ——, 111 S.Ct. 1661 (1991). The court held that *McLaughlin* rendered unconstitutional the statutory provisions for the first appearance before a magistrate, Nev. Rev. Stat. § 171.178, which it viewed as the mechanism for making the probable cause determination. The statute permits a seventy-two hour delay, excluding non-judicial days. The court recognized that its ruling meant that petitioner's probable cause determination was unreasonably delayed and further determined that petitioner suffered prejudice as a result of the delay. The court declined to give the benefit of its ruling in the case to petitioner, however, holding that *McLaughlin* would not be given retroactive effect. JA 6 n.1; 838 P.2d at 924 n.1.

SUMMARY OF ARGUMENT

The narrow issue in this case is whether the Supreme Court of Nevada can decline to apply a controlling precedent of this Court to a case pending before it on direct appeal. The Supremacy Clause dictates that this Court's decisions interpreting the United States Constitution be applied by all courts, because they are the "Supreme Law of the Land." U.S. Const. Art. 6 cl. 2. Under *Griffith v. Kentucky*, 479 U.S. 314 (1987), all courts are required to apply decisions of this Court which impose procedural or substantive rules of constitutional stature, at minimum, to all cases not yet final on direct appeal at the time the decision is rendered. There is no dispute that petitioner's case was not final on appeal at the time *County of Riverside v. McLaughlin*, —— U.S. ——, 111 S.Ct. 1661 (1991) was decided. There is also no dispute that the Nevada Supreme Court found a violation of *McLaughlin* but did not apply *McLaughlin* to petitioner's case. The decision of the Nevada Supreme Court is

inconsistent with the command of *Griffith*, and it therefore violates both the Supremacy Clause and the underlying principles of equal protection enunciated in *Griffith*.

ARGUMENT

I. THE RECORD DEMONSTRATES A PRIMA FACIE VIOLATION OF McLAUGHLIN.

It is clear that the Nevada Supreme Court properly found a straightforward violation of *McLaughlin*. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court recognized that the Fourth Amendment required states to

> "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."

Id. at 125 (footnotes omitted). In *McLaughlin*, this Court refined *Gerstein* and imposed a clear standard for the timeliness of probable cause determinations.

> "Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.
>
> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.
>
> . . . .
>
> Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest."

McLaughlin, supra, 111 S.Ct. at 1670.

In *McLaughlin*, this court left the states considerable latitude in deciding how to structure the procedure for affording the probable cause determination. The court recognized that states might find it efficient to combine the probable cause determination with other procedures, such as bail hearings, arraignment or appointment of counsel. To accommodate these interests, *McLaughlin* allows the states to incorporate the time required to arrange for such proceedings in the period of delay before the probable cause determination which is tolerated as "necessary." In its resolution of the *McLaughlin* issue in this case, the Nevada Supreme Court treated the state statute providing for a suspect's first appearance before a magistrate as the vehicle for securing the probable cause determination. JA 5-6; 838 P.2d at 924.[4] In holding that *McLaughlin*

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[4] Nev. Rev. Stats. § 171.178 provides in pertinent part:

> 1. Except as provided in subsections 5 and 6, a peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charge with offenses against the laws of the State of Nevada.
>
> . . . .

[Continued]

renders the state first appearance statute unconstitutional, the Nevada Supreme Court acknowledged that as long as the two proceedings were combined, the time limits permitted by the statute were inconsistent with the forty-eight hour limit prescribed by *McLaughlin*:

> "Based on *McLaughlin*, we hold that a suspect must come before a magistrate within forty-eight hours, including non-judicial days, for a probable cause determination."

JA 5-6; 838 P.2d at 924. (Footnote omitted.)

There can be no dispute here that petitioner's probable cause determination was delayed beyond the constitutional limit imposed by *McLaughlin*: petitioner was arrested without a warrant on November 3, 1989, and he did not receive a probable cause review, or a combined first appearance before a magistrate, before November 7, 1989. ROA 11. It is equally clear that the delay has not been shown to be necessary, due to any "bona fide emergency or other extraordinary circumstance." It appears that the only document placed before the magistrate was a single form with the arresting officer's declaration. While the declaration itself is not dated, it records the time of the arrest as 3:00 p.m. (1500 hours) on November 3, 1989, and two mechanical data stamps, suggesting that the form was completed by then, show the date and time as 3:42 p.m. on November 3, 1989. ROA 11. The entire four-day delay in petitioner's probable cause determination was therefore unnecessary. The unnecessary delay resulted in a seizure of petitioner's person, e.g., *California*

[4] [Continued]

3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding non-judicial days, the magistrate:

(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and

(b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.

v. Hodari D., —— U.S. ——, 111 S.Ct. 1547, 1549 (1991), and this seizure was illegal under the Fourth Amendment.

II. THE McLAUGHLIN VIOLATION RESULTED IN PREJUDICE TO PETITIONER REQUIRING A REMEDY UNDER STATE AND FEDERAL LAW.

The Nevada Supreme Court's decision acknowledged that the violation of *Gerstein* and *McLaughlin* would invalidate the judgment in this case. The court cited its state remedial law and indicated that reversal was required if *McLaughlin* were applicable:

> "This court has repeatedly held that the defendant must show prejudice which resulted from the delay. See e.g., [*Huebner v. State*, 103 Nev. 29] at 32, 731 P.2d [1330] at 1333 [(1987)]; *Morgan v. Sheriff*, 92 Nev. 544, 546, 554 P.2d 733, 734 (1976).
>
> . . . .
>
> Powell made statements to the police . . . These statements, which were presented to the jury, were clearly prejudicial to Powell."

JA 5; 838 P.2d at 924. This is consistent with state precedents providing that statements elicited as a result of unnecessary delay in pretrial proceedings are inadmissible:

> "Mere delay between arrest and arraignment, without some showing of prejudice to defendant's constitutional rights, does not deprive the court of jurisdiction to proceed. [Citations]. Where there has been no interrogation during the delay, and the accused has not confessed or made incriminating statements, the delay has caused no prejudice to the accused, and his rights have not been violated. [Citation.]"

Huebner v. State, supra, 103 Nev. at 32; *Sheriff v. Berman*, 99 Nev. 102, 106, 659 P.2d 298 (1983); *Morgan v. Sheriff, supra*, 92 Nev. at 546. When custodial interrogation has produced a statement, however, the delay is prejudicial:

> "In the state courts the failure to bring the arrested person immediately before a magistrate after his arrest has been asserted to make any confession or admission obtained from him during the interim inadmissible if the delay was causally connected with the securing of the confession. [Citations.]"

Brown v. Justice's Court, 83 Nev. 272, 276, 428 P.2d 376 (1967).[5]

State and federal law do not require the reversal of a conviction solely because of an illegal delay in the probable cause determination. *Gerstein v. Pugh, supra*, 420 U.S. at 119; *Huebner v. State, supra*, 103 Nev. at 32. The state law rule prescribed by the Nevada Supreme Court, however, required the exclusion of petitioner's statement obtained on November 7, 1989, and the Court's decision acknowledged the prejudice to petitioner, and hence the necessity of reversal under state law, if *McLaughlin* were applied in this case.[6] Further, under federal law, the illegal delay in the probable cause determination requires reversal of the conviction. When a statement is obtained as a result of a Fourth Amendment violation, the principles lying at the "crossroads of the Fourth and the Fifth Amendments", *Brown v. Illinois*, 422 U.S. 590, 591 (1975) require its exclusion unless the taint of the illegality is attenuated. *Id.* It is clear that the giving of *Miranda* warnings does not conclude this issue:

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[5] These authorities do not distinguish between delays in the various pretrial proceedings. The Nevada Supreme Court's decision in this case, by subjecting the first appearance statute to analysis under *McLaughlin*, signalled that delay in the probable cause determination is on the same footing as delay in the first appearance and arraignment. JA 6; 838 P.2d at 924.

[6] Any novel analysis by this Court of the appropriate remedy under federal law, see, e.g., *United States v. Alvarez-Sanchez*, 975 F.2d 1396 (9th Cir. 1992), *cert. granted*, —— U.S. —— (1993), therefore will not affect the disposition of the case. See *Michigan v. Long*, 463 U.S. 1032, 1038-1042 (1983).

> "It is entirely possible, of course . . . that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. See *Westover v. United States*, 384 U.S. 436, 496-497 (1966)."

Brown v. Illinois, supra, 422 U.S. at 603. This analysis of the voluntariness of a waiver of *Miranda* rights and of any resulting statement must take into account the period of illegal detention and not merely the giving of *Miranda* warnings:

> "Exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation."

Id. at 601 (footnote omitted).

The policies underlying the Fourth and Fifth Amendments support the exclusionary remedy in this situation. In *Gerstein*, this Court recognized the "high stakes" which are implicated in the seizure of a person by virtue of a warrantless arrest and further recognized that "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest." 420 U.S. at 114. Chief among these is the isolating and coercive effect of the illegally-prolonged detention itself, which increases the likelihood that a suspect will speak involuntarily and therefore unreliably. Cf. *Beckwith v. United States*, 425 U.S. 341, 342, 346-347 (1976) (*Miranda* warnings not required when subject of interrogation was in own home and not in coercive setting of police cus-

tody); *Mathis v. United States,* 391 U.S. 1, 8 (1968) (White, J., dissenting) (*Miranda* rule should have no application "to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation of a criminal suspect.")

> "In a *Gerstein* case the passage of time actually makes the violation worse. Although the taint of an unlawful arrest may tend to dissipate with time, it is not the arrest that is unlawful in a *Gerstein* case. It is, instead, the detention itself that becomes unlawful at a certain point, and the pressure to confess most likely increases as the detention gets longer . . . . Each moment of detention is a fresh violation, increasing the opportunity for the government to exploit the illegality."

Thomas, *The Poisoned Fruit of Pretrial Detention,* 61 N.Y.U.L. Rev. 413, 458-459 (1986) (footnotes omitted). In short, "illegal custody becomes more oppressive as it continues uninterrupted." 1 W. LaFave and J. Israel, *Criminal Procedure* § 9.4(a) at 744 (1984).

It is precisely this coercive effect which makes the exclusionary remedy of the Fourth Amendment, or a remedy under state law, appropriate for a violation of *Gerstein.* The *McLaughlin* decision explicitly recognizes that it is impermissible to delay the probable cause determination to gather further evidence about the charged offense. 111 S.Ct. at 1670. This prohibition plainly includes delays motivated by a desire to "soften up" the suspect for interrogation. See *id.* at 1676 n.3 (Scalia, J., dissenting). Only an exclusionary remedy will deter the exploitation of unnecessary delay for these purposes, which are impermissible under *McLaughlin.*

Prolonged detention is also likely to affect the reliability as well as the voluntariness of any statement produced by it, and thus an exclusionary remedy for a *Gerstein* violation increases the reliability of any resulting judgment. See *Withrow v. Williams,* —— U.S. ——, 113

S.Ct. 1745, 1761 (1993); *Johnson v. New Jersey,* 384 U.S. 719, 730 (1966); see also *Schneckloth v. Bustamonte,* 412 U.S. 218, 240 (1973). The oppressive effect of custody is likely to induce in the suspect a willingness to give false statements as much as to give accurate ones, simply in the desire to explain away the state's suspicions in order to get out of custody. In this case, for instance, the state argued that petitioner's statements produced by the prolonged detention were mostly false. ROA 3984, 3987-3988, 3998-4002. The effect of prolonged detention upon the reliability of statements elicited from a suspect is particularly important in capital cases, where the need for reliability is heightened. See *Ford v. Wainwright,* 477 U.S. 401, 411, 414 (1986) (plurality opn.). The societal cost of exclusion of such evidence is thus significantly less than exclusion of "inherently trustworthy tangible evidence" obtained as a result of an unlawful search. Cf. *United States v. Leon,* 468 U.S. 897, 907 (1984); *Stone v. Powell,* 418 U.S. 464, 479, 490-491 (1976). On the other hand, the deterrent effect on police and other prosecutorial agencies is likely to be substantial, since exclusion of evidence produced by an impermissibly-prolonged detention will remove the incentive to exploit the coercive effect of custody to obtain statements and will provide an incentive to eliminate unnecessary delays in conducting the probable cause hearing.[7]

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[7] There can be no reasonable argument that reliance on the state first appearance statute supplies a "good faith" basis for the state's action in this case. Cf. *Illinois v. Krull,* 480 U.S. 340, 349-350 (1987). Like *McLaughlin*'s standards for promptness in the probable cause review, the state statutory scheme requires the initial appearance to occur "without unnecessary delay." Also like *McLaughlin,* the statute imposes a time limit beyond which a deteniton is presumed to be unjustified. Finally, like the *McLaughlin* forty-eight hour rule, the seventy-two hour rule imposed by the statute does not validate unnecessary delays within that period but merely identifies the point beyond which the length of time must be justified by the state. Thus a police officer or other official could not have an objectively reasonable relief that a delay of less than

In this case, the Nevada Supreme Court did not apply *McLaughlin* and therefore it did not enforce its own remedy under state law. Although the state law remedy recognized in the Nevada Supreme Court's decision requires reversal of the conviction, that court should be allowed to dispose of that issue in the first instance. Compare *Yates v. Aiken*, 484 U.S. 211 (1987), with *Yates v. Evatt*, 500 U.S. ——, 111 S.Ct. 1884 (1991).[8] Again, since the Nevada Supreme Court did not apply *McLaughlin*, it did not consider the constitutional violation as a factor in its analysis of the admissibility of petitioner's statements under the Fifth Amendment.[9] Accordingly, the judgment must be reversed and remanded to the Nevada Supreme Court if the *McLaughlin* decision is applicable to this case.

III. THE NEVADA SUPREME COURT WAS REQUIRED TO APPLY THE McLAUGHLIN DECISION TO PETITIONER'S CASE WHICH WAS BEFORE IT ON DIRECT APPEAL.

Thus we come to the narrow issue presented for resolution here, which is whether the *McLaughlin* decision applies to petitioner's case. Having reached and disposed of the *McLaughlin* issue on the merits, and having found

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seventy-two hours would be permissible if that delay is not necessary. In any event, since the existence of any such relief was not suggested or litigated below, this case would be a wholly inappropriate vehicle for determining that issue.

[8] It must be assumed that the Nevada Supreme Court will correct its aberrant action in this case. In fact, in a case decided after petitioner's, the Nevada Supreme Court applied new federal constitutional rules to a case which was pending before it on direct appeal, although it did not acknowledge the existence of *Griffith*. *Felix v. State*, 109 Nev. 151, 849 P.2d 220 (1993).

[9] Although the court purported to find a waiver of petitioner's statutory rights to a prompt first appearance and arraignment as a result of his waiver of *Miranda* rights, JA 6-7; 838 P.2d at 925; it did not, and could not, find that the *Miranda* warnings had necessarily dissipated the taint of the illegal detention. *Brown v. Illinois, supra*, 422 U.S. at 607. See Argument V, below.

that *McLaughlin* was violated, the Nevada Supreme Court declined to apply that controlling decision to petitioner's case, although the case was before the court on direct appeal. Citing the retroactivity test derived ultimately from *Linkletter v. Walker*, 381 U.S. 618 (1965), the court held that "the forty-eight hour requirement mandated by *McLaughlin* does not apply to the case at hand." 838 P.2d at 924 n.1.

The Nevada Supreme Court's action plainly violated the federal constitution. The holding of *Griffith v. Kentucky*, 479 U.S. 314, 322, 328 (1987), could not be clearer:

> "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.
>
> . . . .
>
> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past."

This Court has relied upon the rule of *Griffith* in its subsequent criminal cases analyzing the availability of collateral review for constitutional violations. The obligation of state courts to apply current constitutional doctrine, and the difference, for equal protection purposes, between applying new constitutional rules on direct or collateral review, have been invoked as the rationale for restricting the availability of relief in collateral procedures. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opn.); see, e.g., *Lockhart v. Fretwell*, —— U.S. ——, 113 S.Ct. 838, 844 (1993); *Butler v. McKellar*, 494 U.S. 407, 414 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); see also *Brecht v. Abrahamson*, —— U.S. ——, 113 S.Ct. 1710, 1720 (1993). For this scheme to retain

its legitimacy, however, state courts must be rigorously held to their obligation to enforce federal constitutional rights on direct appeal.

In civil cases, this Court has reaffirmed the *Griffith* rule and has emphasized the unequivocal duty of state court to apply federal constitutional law, including the federal equal protection principles underlying the *Griffith* rule itself. Thus the Court has recognized that the retroactivity analysis applicable to a constitutional precedent is as much a federal constitutional question as the underlying substantive issue.

> "The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law."

Harper v. Virginia Department of Taxation, —— U.S. ——, 113 S.Ct. 2510, 2519 (1993) (citations omitted). This Court summarized its position in its most recent decision:

> "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith's* ban against 'selective application of new rules.' 479 U.S., at 323, 107 S.Ct. at 713. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, *id.* at 322, 107 S.Ct. at 712, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit the 'substantive law [to] shift and spring' according to 'the particular

> equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. [*James B.*] *Beam* [*Distilling Co. v. Georgia*], —— U.S., at ——, 111 S.Ct. [2439], at 2447 [(1991)] (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking* [*Assns., Inc. v. Smith*] 496 U.S. [167] at 214, 110 S.Ct. [2323] at 2350 [(1990)] (STEVENS, J., dissenting)."

Id. at 2517-2518.

In light of this authority, little argument—indeed, no argument—is necessary to demonstrate that the Nevada Supreme Court could not rely upon the *Linkletter* test in order to avoid applying *McLaughlin* to petitioner's case. Having reached the federal question and having found a violation of *McLaughlin*, the Nevada Supreme Court simply had no power to decline to apply *McLaughlin* to petitioner's case, under the plain terms of *Griffith* and *Harper*, and under this Court's general Supremacy Clause jurisprudence. E.g., *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958). Since there is no question that the Nevada Supreme Court did find that *McLaughlin* had been violated but did not apply *McLaughlin* to petitioner's case on retroactivity grounds, JA 6 n.1; 838 P.2d at 924 n.1, the judgment must be reversed.

IV. THE NEVADA SUPREME COURT HAD THE POWER TO REACH THE FEDERAL CONSTITUTIONAL ISSUE DECIDED IN THIS CASE AND THIS COURT THEREFORE HAS JURISDICTION TO REVIEW ITS DECISION.

Respondent contended in its opposition to the petition for certiorari that the *McLaughlin* issue was not properly before the Nevada Supreme Court. The Nevada Supreme Court's power to reach and decide the *McLaughlin* issue despite the failure of the parties to raise it is as clear as the *McLaughlin* violation itself. There can be no reasonable dispute that the Supreme Court of Nevada, under its own governing law and practice, has the power to address issues not raised by the parties. It regularly exercises this power in both civil and criminal cases, not only to address issues which are raised on appeal although they were not preserved in the trial court,[10] but also to raise and address sua sponte issues not presented at all by the parties on appeal. For instance, in *Guy v. State*, 108 Nev. 770, 839 P.2d 578, 588 (1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1656 (1993), the appellant argued that several instances of prosecutorial misconduct were grounds for reversal, and the court rejected those arguments. The court then proceeded to identify another instance of misconduct, not raised by the appellant, and concluded on the merits that this instance did constitute prosecutorial

[10] The Nevada Supreme Court has the statutory power to review plain errors in the admission of evidence without an objection by the party below, Nev. Rev. Stats. § 47.040(2), and to review plain errors of all sorts affecting substantial rights in criminal cases. Nev. Rev. Stats. § 178.602. While it does not always invoke these provisions explicitly, the court frequently exercises what it recognizes as its own power to review plain errors or constitutional errors which have not been raised in the proceedings below. E.g., *Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718 (1991) (addressing prosecutorial misconduct issues despite absence of objection below); *Jones v. State*, 101 Nev. 573, 580, 707 P.2d 1128 (1985) (party's participation in drafting instructions does not bar consideration of constitutional errors in instruction).

misconduct but that it was harmless. In *Tahoe Village Homeowners v. Douglas Co.*, 106 Nev. 660, 662 n.1, 799 P.2d 556 (1990), the court reviewed a judgment of dismissal. Although the appellant had not raised the issue, the Supreme Court found that the trial court erred in dismissing one of the causes of action in the complaint because it did state a claim for relief. In *Bejarano v. State*, 106 Nev. 840, 843, 801 P.2d 1388 (1990), an appeal from the denial of postconviction relief, the court sua sponte raised and disposed of an issue of ineffective assistance of counsel based on trial counsel's failure to present evidence of mitigating factors in the penalty phase of a capital trial, when mitigating evidence was apparent in the trial record.

The Nevada Supreme Court treats this power as indisputable:

> "The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. [citation] Such is the case where a statute which is clearly controlling was not applied by the trial court."

Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d 227 (1986).[11] The court's power to review plain errors is

[11] Accord, *Crow-Spieker #23 v. Helms*, 103 Nev. 1, 3, 731 P.2d 348 (1987) (reversing for error in finding breach of contract for right of first refusal to purchase land, where right of first refusal neither exercised nor implicated, and error "glaringly apparent upon the face of the record" despite failure of parties to raise it); *Jones v. State, supra*, at 580 (court raises the issue of whether error to give jury instruction on possibility of executive clemency in penalty phase of capital trial); *Summit v. State*, 101 Nev. 159, 161 n.2, 697 P.2d 1374 (1985) (reversing conviction for violation of defendant's right to confrontation resulting from application of rape shield law, although constitutional issue not raised on appeal); *Desert Chrysler-Plymouth v. Chrysler Corp.*, 95 Nev. 640, 643-644, 600 P.2d 1189 (1979) *cert. denied*, 445 U.S. 964 (1980) (court raises and disposes of separation of powers issue with respect to validity of statute, although not raised by parties); *Boswell v. Warden*, 91 Nev. 284, 285, 534 P.2d 1263 (1975) (reversing summary dis-

bestowed by statute,[12] and the court itself has explicitly recognized its own power to address issues sua sponte in its adoption of a rule governing its review of capital cases.[13]

In this case, the Nevada Supreme Court reached and decided the *McLaughlin* issue. Whether or not it was obligated to do so, under its own practice the court clearly

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missal of habeas corpus petition sua sponte); *Western Indus. v. General Ins. Co.*, 91 Nev. 222, 230, 533 P.2d 473, 478 (1975) (the court reviews an error in judgment for full value of stock, without providing for disposition of stock itself, although parties "raised no issue in this regard" on appeal); *Crescent v. White*, 91 Nev. 209, 210, 533 P.2d 159 (1975) (dismissing appeal on issue of absence of appealable order raised by court sua sponte); *Wilson v. Perkins*, 82 Nev. 42, 409 P.2d 976 (1966) (ordering redistribution of award of damages in compliance with statute, although issue not raised on appeal); *Radovich v. W.U. Tel. Co.*, 36 Nev. 341, 348, 135 P. 920 (1913) ("it would, we think, be unfortunate if it were an inflexible rule that a court of last resort, in all cases, could only consider questions actually discussed in the briefs"); see also *Torres v. Farmers Insurance Exchange*, 106 Nev. 340, 345 n.2, 793 P.2d 839 (1990) (even if party had not raised issue on appeal, reversal of summary judgment based upon provisions of insurance policies would have been required because insurer did not submit copies of policies to court on summary judgment motion; dictum).

The true extent to which the court actually exercises this power is unknown. The Nevada Supreme Court disposes of the vast majority of its cases through unpublished orders. See Notice, 99 Nev. 847 (1983). The terms of these decisions are not accessible since they are not published, and the number of cases in which the court has raised issues sua sponte in the course of rendering decisions in them is currently undetermined.

[12] Nev. Rev. Stats. § 178.602 provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

[13] Nevada Supreme Court Rule 250(IV)(H) permits the court to remand for further proceedings in the trial court "with respect to issues raised by the parties on appeal or perceived by the Supreme Court as being important although not asserted by the defendant or the state."

had the power to reach the federal constitutional question on its own motion. Accordingly, this Court's jurisdiction to review the federal question decided by the Nevada Supreme Court cannot be disputed. "We may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied. *Beecher v. Alabama*, 389 U.S. 35, 37 n.3 (1967)". *Michigan v. Long, supra*, 463 U.S. at 1038 n.4; *Ulster County Court v. Allen*, 442 U.S. 140, 149-154 (1979).

V. THERE HAS BEEN NO WAIVER OF PETITIONER'S RIGHT TO A PROMPT PROBABLE CAUSE DETERMINATION UNDER McLAUGHLIN.

Finally, respondent contended in the opposition to the petition for certiorari that there was a waiver of the *McLaughlin* error as a result of petitioner's waiver of his rights under *Miranda v. Arizona*. This argument is unsustainable for several reasons. The purported waiver cited by respondent, and discussed in the Nevada Supreme Court's opinion, does not refer at all to the probable cause issue arising from *McLaughlin*. Since the court explicitly held that it was not applying *McLaughlin* to petitioner's case, there was no reason for the court to discuss waiver with respect to that issue. Further, by its own terms, the court's discussion of waiver is not directed to the delay in the probable cause determination. Quoting *Deutscher v. State*, 95 Nev. 669, 680, 601 P.2d 407, 414 (1979), the court indicated "when an accused voluntarily waives his right to silence and his right to counsel, he concurrently waives his right to be seasonably *arraigned*." J.A. 6; 838 P.2d at 925 (emphasis supplied). In petitioner's case, the court held that "[b]y waiving those [*Miranda*] rights, he thereby waived his right to a timely arraignment [and] to an appearance before a magistrate within seventy-two hours." JA 7-8; 838 P.2d at 925 (citation omitted). By referring to the seventy-two hour limit, which is contained in Nev. Rev. Stats. § 171.178(3), the court made

it unmistakably clear that it was not referring to a waiver of *McLaughlin* rights but only to a waiver of rights under the statute which it had just held was unconstitutional under *McLaughlin*.

The Nevada Supreme Court's discussion of a purported waiver also centers on the policies which are served by timely arraignment and by the giving of *Miranda* warnings, which are identified by the court as interests protected by the Fifth and Sixth Amendments. JA 7-8; 838 P.2d at 925. The interest protected by *McLaughlin*, however, is a Fourth Amendment interest, the right not to be imprisoned without a judicial determination of probable cause. Since the Nevada Supreme Court explicitly declined to apply *McLaughlin*, it is hardly surprising that it did not discuss any purported waiver of Fourth Amendment rights under *McLaughlin*, and the absence of any such discussion in turn indicates that no finding of waiver can be made.

Even if any language regarding waiver in the Nevada Supreme Court's opinion could be viewed as relevant to *McLaughlin*, there would be no substantive basis for implying a waiver of Fourth Amendment rights from a waiver of Fifth and Sixth Amendment rights. As Justice Scalia's opinion for the Court in *McNeil v. Wisconsin*, —— U.S. ——, 111 S.Ct. 2204 (1991) recognized, the interests protected by the Fifth and Sixth amendments are different, and an invocation of rights under one amendment does not imply an invocation of rights under another. By the same token, a waiver of rights under one constitutional provision cannot be construed as "an intentional relinquishment or abandonment of a known right or privilege", *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), under a separate constitutional provision protecting different interests. Indeed, this Court has recognized this fact explicitly: "The *Miranda* warnings in no way inform a person of his Fourth Amendment rights, including his right to be released from unlawful custody . . . ." *Brown v. Illinois, supra*, 422 U.S. at 601 n.6. The fact that

Miranda warnings are not meant as a substitute for promptly bringing the suspect before a magistrate is also recognized in the *Miranda* decision itself. 384 U.S. at 463 n.32. This is simple common sense:

> "there is a sharp psychological contrast between a scene in a jail in which an arrested person is told of his or her rights by police officers and a scene in a courtroom or judicial chambers in which an arrested person is told of his or her rights by a neutral and detached magistrate. Also, it seems that the argument [that a *Miranda* waiver also waives the right to a prompt first appearance] proves too much; if valid, it means that there need be little urgency in bringing an arrested person before a magistrate."

United States v. Erving, 388 F.Supp. 1011, 1020-1021 (W.D. Wis. 1975). Thus to the extent that the decision below, and the *Deutscher* decision on which it relies, assume that a waiver of *Miranda* rights waives any claim of unreasonable delay in any initial proceeding and necessarily validates admission of a statement elicited after a period of illegal detention, that position is in conflict with this Court's precedents. Accordingly, the waiver discussion in the Nevada Supreme Court's opinion does not and cannot affect the issue presented before this Court.

Further, the waiver rule relied upon by the Nevada Supreme Court, derived ultimately from *Pettyjohn v. United States*, 419 F.2d 651, 655-656 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970), is unsound in itself. In *Pettyjohn*, the defendant went to the police station to "turn himself in" and confessed to two murders. He was immediately arrested and informed of his *Miranda* rights, and he gave a statement. Subsequently he moved to suppress the statement on the ground that he was not "promptly" taken before a magistrate. The court stated:

> "We feel that appellant's argument here borders on the absurd. Surely the law does not allow a person to voluntarily discuss the crime to which he has

> just confessed for a period of some twenty minutes and then claim on appeal that the twenty minute period during which they spoke constituted a prejudicial delay in violation of his right to rapid arraignment."

Id. at 656. Referring to language from *Frazier v. United States,* 419 F.2d 1161, 1166 (D.C. Cir. 1969), holding that "[a] valid *Miranda* waiver is necessarily, for the duration of the waiver, also a waiver of an *immediate* judicial warning of constitutional rights" (emphasis supplied and deleted; footnotes omitted), the court concluded that there had been no violation of *Mallory v. United States,* 354 U.S. 449 (1957) and *McNabb v. United States,* 318 U.S. 332 (1943). *Pettyjohn v. United States,* 419 F.2d at 656.

The most the *Pettyjohn* decision legitimately stands for is the proposition that a waiver of *Miranda* rights and the giving of a statement waives a claim that the first appearance before a magistrate was unnecessarily delayed during the time it took to record the statement. *Pettyjohn*'s extremely dubious progeny, e.g., *Deutscher v. State,* 95 Nev. at 680; *United States v. Indian Boy X,* 565 F.2d 585, 591 (9th Cir. 1977), *cert. denied,* 439 U.S. 841 (1978); *United States v. Woods,* 468 F.2d 1024, 1026 (9th Cir.), *cert. denied,* 409 U.S. 1045 (1972), treat that rule as if a waiver of *Miranda* rights excuses any illegal detention, however prolonged or coercive. Allowing an indefinite delay in arraignment, or in any other judicial process, solely because the defendant has once waived his *Miranda* rights, deforms the common sense rule of *Pettyjohn* beyond all reason and cannot be accepted by this Court. See *Brown v. Illinois, supra,* 422 U.S. at 603.

In any event, the concept of waiver is particularly ill-suited to analysis of delay in a probable cause determination. By definition, a waiver is an individual's own "intentional relinquishment of a known right or privilege." *Johnson v. Zerbst, supra,* 304 U.S. at 464. This implies

action by the individual in deciding which of various courses to take. But an incarcerated suspect, before appointment of counsel at arraignment, has no ability to secure a probable cause determination: the suspect is completely within the power of the police or other authorities and is entirely dependent upon those authorities to bring him before a magistrate, process the paperwork to subject the warrantless arrest to judicial review, or take any other action with respect to the suspect's status. Some courts have therefore recognized that the suspect's rights with respect to the timeliness of the initial stages of the formal criminal process, which only the state can initiate, are not waivable by the defendant. *United States v. Haupt,* 136 F.2d 661, 671 (7th Cir. 1943); *Dainard v. Johnson,* 149 F.2d 749, 751 (9th Cir. 1945) (dictum); *United States v. Cooper,* 504 F.2d 260, 265, n.3 (D.C. Cir. 1974) (Fahy, J., concurring). The rule of *Pettyjohn,* which recognizes an implied waiver only as to the time necessary to complete other steps required by the suspect's participation in administrative processing, is consistent with these cases and with the principle underlying *Gerstein* and *McLaughlin,* which permits delay only to the extent that it is necessary.

Finally, in the context of this case, there is nothing before the court suggesting that a waiver, if one is possible, actually occurred. There is no dispute that the purported waiver of timely arraignment referred to by the Nevada Supreme Court occurred on November 7, 1989, after the forty-eight hour limit prescribed by *McLaughlin* had already expired; thus the constitutional violation at issue was complete before any purported waiver was elicited. Petitioner has been able to find no case in which an "ex post facto" waiver of a constitutional violation has been recognized. A somewhat analogous situation is presented by cases involving the admission of multiple statements by a defendant, when one statement is obtained in violation of *Miranda* but other statements are elicited in compliance with *Miranda.* These cases generally analyze

whether the other statements were products of the inadmissible statement or whether introduction of the other statements renders harmless the error in admitting the constitutionally infirm one; but no such case has ever purported to find that a valid waiver of *Miranda* rights as to one statement waives the constitutional violation with respect to a different one. See *Milton v. Wainwright*, 407 U.S. 371, 372-377 (1972); *Oregon v. Elstad*, 470 U.S. 298, 314-318 (1985); *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987); cf. *United States v. Mitchell*, 322 U.S. 65, 69-70 (1944) (illegal prolongation of detention does not require exclusion of statements properly obtained before illegal detention; dictum). Under these circumstances, there is no basis whatsoever for finding a waiver of petitioner's rights under *McLaughlin*.

CONCLUSION

For the reasons stated above, this court must vacate the judgment and remand this case to the Supreme Court of Nevada for further proceedings in light of *County of Riverside v. McLaughlin* and *Griffith v. Kentucky*.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1993

KITRICH POWELL,

Petitioner,

v.

NEVADA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the Nevada Supreme Court's application of *McLaughlin*'s forty-eight hour limit for a magistrate's probable cause determination to Nevada's initial appearance statute constitute the determination of a federal constitutional rule requiring the retroactive application of the exclusionary rule to Powell's custodial statement to police?

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STATEMENT OF THE CASE

Powell lived with Sharon Allen and her three children. During the day, Powell stayed home and took care of Melea Allen, Mrs. Allen's four-year-old daughter, while the older children were at school and Mrs. Allen was at work. (J.A. 2).

Neighbors frequently noticed that Melea had bruises on her face and legs and that on at least one occasion Melea had a lacerated chin and one of her eyes was quite red. Once, a neighbor heard Melea screaming and crying. When he saw her ninety minutes later, he noticed new bruises on her face and legs that had not been there the night before. In this neighbor's presence Powell asked

Melea how she had gotten hurt and she said, "Daddy (Powell), you did it." Powell then said, "No baby, remember you fell in the tub, remember?" Powell then repeated this conversation with Melea as if they were rehearsing. (J.A. 3).

On the evening of November 2, 1989, Melea was not herself; she was quiet and inactive. She could not move her head and was experiencing head and back pain. The side of her head was soft and spongy, and she had a new bruise on her forehead. She told her siblings and her mother that she had fallen from Powell's shoulder. (J.A. 3).

The next morning Melea was unable to hold up her head and could not walk without assistance. Her mother went to work and her brother and sister went to school; she was left alone with Powell. (J.A. 3). Powell finally decided to take Melea to the hospital and he got a ride from Mrs. Eileen Richards. Mrs. Richards testified that Powell told her that Melea had accidentally fallen from his shoulder (v. 18, 3134)[1]. By the time Melea was admitted to the hospital she was unconscious and in critical condition. (J.A. 3). Powell explained to the admitting nurse, Ms. Sylvia Clark, that Melea had accidently fallen from his shoulder (v. 18, 3136).

An examination of Melea revealed a deep laceration on her chin, which was in the process of healing, and a number of bruises which were in different stages of healing. Melea's buttocks showed a pattern of successive

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[1] References to the record on appeal before this Court are to the volume and folio number of said record.

injuries. She was extensively bruised all over her body and her spine had been fractured. The most recent and most severe injury had caused her brain to swell and was the cause of the coma. (J.A. 3-4).

"The State's expert witness, Dr. Richard Krugman, testified that in the last three years he had seen only one head injury which was similar to Melea's. That injury resulted from an adolescent being propelled off the top of a pick-up truck at forty-five miles per hour onto a concrete surface." (J.A. 4).

Melea's injuries suggested a repetitive pattern of daily injury and all three physicians who testified agreed that Melea's injuries were not the result of accidents and that Melea had been subjected to severe abuse for some time. Melea died from the head injury on November 8, 1989 without ever regaining consciousness. (J.A. 4).

At approximately 12:45 p.m. on November 3, 1989, while at the hospital with Melea, Powell spoke with Detective Alfred Leavitt. Powell was not in police custody or under arrest, and could have left if he wanted to leave. In fact, Powell did leave on a couple of occasions to smoke a cigarette outdoors (v. 20, 3608). Powell voluntarily gave a statement to Detective Leavitt, which Leavitt recorded. At no time did Petitioner object to making a statement or having it recorded (v. 20, 3610-11).

In the statement, Powell claimed that Melea was his daughter and that Mrs. Allen was his wife. He told Detective Leavitt that he had been playing with Melea, had lifted her over his shoulder, and she had fallen backwards and hit her head (v. 20, 3617). He also said that in the past he had punished her by spanking her on the "butt," but

that he had not punished her in any other manner nor had he intentionally caused any injuries to her (v. 20, 3619). At about 3:00 p.m., approximately two hours after taking Petitioner's statement, police arrested Powell on charges of felony child abuse (Brief for Petitioner, at 6).

On Tuesday, November 7, 1989, while still in jail, Powell was read his *Miranda* rights; Powell waived his rights to remain silent and right to counsel and the police conducted a voluntary custodial interview. (J.A. 7). This second statement of Petitioner essentially restated what he had said in the noncustodial statement made November 3, 1989: that Melea had accidentally fallen from his shoulders; that the other various injuries were the result of other accidents; and that although he would physically discipline Melea he had never intended to hurt her (v. 20, 3636, 3671-78, 3683-85). Also on November 7, a magistrate, after reviewing the arresting officer's Declaration of Arrest, found probable cause for and continued detention of Powell (v. 1, 11). The following day, when Melea died, an amended criminal complaint was filed charging Petitioner with murder.

On April 5, 1991, prior to trial, Petitioner argued a motion to suppress information that had been inadvertently obtained from Petitioner's diary in connection with another case by a disinterested Deputy District Attorney (v. 10, 1578-1649). The State decided not to pursue acquisition of Powell's diary (v. 10, 1682). Petitioner made no other motions to suppress, nor did he claim that his right

to a prompt probable cause determination under *Gerstein*[2] had been violated.

In the guilt phase of the jury trial both Melea's brother and sister testified that Powell had been in the habit of hitting all three children (v. 18, 3192-93, v. 19, 344-46). Petitioner was found guilty of Murder in the First Degree and in the penalty phase he was sentenced to death. Petitioner appealed his conviction to the Nevada Supreme Court and raised the following issues on appeal:

- That Defendant's conviction should be reversed because the state failed to comply with NRS 171.178(3)
- That the trial court abused its discretion in allowing Melinda Allen to testify
- That guilt phase instruction numbers 7 (2), 9 and 10 were defective in that the terms "willful" and "deliberate" as element of first were undefined and the law pertaining therein was misstated
- That the trial court erred in giving instruction number 17 which wrongly defined the reasonable doubt standard of proof in a criminal case
- That the trial court abused its discretion in admitting hearsay testimony of an alleged sexual molestation of a child during the penalty phase
- That the trial judge committed error in giving an anti-sympathy instruction

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[2] 420 U.S. 103 (1975).

The Nevada Supreme Court upheld the conviction and sentence. Powell petitioned for a writ of *certiorari*, and the sole issue presented to the Court was whether a state court may decline to apply a controlling Fourth Amendment decision of this Court to a case pending before it on direct appeal with impunity. On that issue alone the Supreme Court granted *certiorari*.

SUMMARY OF THE ARGUMENT

I

Petitioner alleges that his right to a prompt probable cause determination, pursuant to *Gerstein* and *McLaughlin*, was violated. The State of Nevada argues that since the issue of whether Powell's *Gerstein* rights were violated was never passed or pressed upon by the Nevada Supreme Court, this Court has no jurisdictional grounds on which to review this matter.

This Court has held that subject matter jurisdiction fails unless a federal question has been both raised and decided in the state court below.

Not only did Petitioner fail to raise a *Gerstein/McLaughlin* issue on direct appeal, the only pre-trial motion to suppress filed did not relate to his custodial statement. Additionally, although Petitioner objected to the introduction of his custodial statements at trial, the objection was based on the best evidence rule, not the Fourth Amendment. Petitioner has never alleged a *Gerstein/McLaughlin* violation until petitioning this Court.

The assignment of error claimed by Powell to the Nevada Supreme Court was not that he was denied protection under *Gerstein/McLaughlin*, but rather that he was not properly brought before a magistrate within the seventy-two hour standard required by Nevada Revised Statute (NRS) 171.178(3). Even though the Nevada Supreme Court made note of *McLaughlin* in their opinion, the case was used merely as a reference in interpreting the "timely arraignment" requirement of Nevada Revised Statute 171.178.

The Nevada Supreme Court misconstrued this Court's forty-eight hour rule for a timely probable cause determination to be applicable to Nevada's initial appearance statute and declared the seventy-two hour period in the state statute to be unconstitutional. This Court has held that state courts should be permitted to rest their decisions on adequate and independent state grounds. The Nevada Court was merely articulating a state rule of criminal procedure. The retroactivity analysis set forth in *Griffith v. Kentucky* only applies to new federal constitutional rules. The Nevada Supreme Court was therefore not obligated to apply the *Griffith* rule in its analysis.

II

Based on the policy consideration underlying the exclusionary rule, the State of Nevada maintains that Petitioner's request for the suppression of his custodial statement be denied. The remedial effect of the exclusionary remedy of the Fourth Amendment is to deter police

misconduct in order to insure the reliability of confessions. However, where a law official's conduct is objectively reasonable, in that his actions are consistent with the law at the time of the conduct, application of the exclusionary rule fails to serve its desired deterrent effect and its application is inappropriate.

From the record, there is no evidence that the delay in Powell's initial appearance motivated him to make an involuntary custodial statement. Furthermore, after being given his *Miranda* warnings, Petitioner voluntarily waived his right to remain silent and his right to counsel. Yet, *Miranda* alone does not insure that the statements are of sufficient free will as to purge the damage of unlawful conduct. Other key factors to be taken into consideration include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.

Despite the delay in his initial appearance, Powell's Fourth and Fifth Amendment rights were adequately protected. In fact, Petitioner himself conceded this by not challenging the voluntariness of statements on direct appeal.

Finally, Powell seeks to have his conviction reversed on the basis that supposedly the Nevada Supreme Court found a *McLaughlin* violation to have occurred but failed to apply it to Petitioner's case on retroactivity grounds. Under the holding in *Gerstein*, a suspect presently being detained may challenge the probable cause for that confinement, but a conviction will not be overturned simply because the defendant was detained pending trial without a determination of probable cause. Additionally,

should this Court determine that Powell's custodial statements were improperly admitted at trial, the State submits that any allegation of error is harmless.

ARGUMENT

I THE NEVADA SUPREME COURT WAS NEVER PRESENTED WITH, NOR DID IT DETERMINE, THE QUESTION WHETHER THE STATE VIOLATED POWELL'S RIGHT TO A PROBABLE CAUSE DETERMINATION BY A NEUTRAL AND DETACHED MAGISTRATE AND THEREFORE THERE IS NO FEDERAL CONSTITUTIONAL QUESTION PROPERLY PRESENTED FOR THIS COURT'S REVIEW

A. The Issue of Whether Petitioner's *Gerstein* Rights Were Violated Was Never Pressed or Passed Upon Below

Inasmuch as Powell failed to argue to the Nevada Supreme Court on direct appeal that his rights pursuant to *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S.Ct. 1661 (1991),[3] had been violated, this Court has no jurisdictional grounds on which to review this matter. If an issue has not been presented to a state court in such a manner that it was necessarily decided by that state's highest court when it affirmed the conviction, this Court has no jurisdiction to consider the issue. *Street v. New York*, 394 U.S. 576 (1969).

[3] *McLaughlin* had been decided prior to the submission of Powell's opening brief to the Nevada Supreme Court.

In *Illinois v. Gates*, 462 U.S. 213, 218, *reh'g denied*, 463 U.S. 1237 (1983), this Court reaffirmed its position that this Court has no subject matter jurisdiction unless a federal question has been both raised and decided in the state court below, otherwise appellate jurisdiction fails. Justice Rehnquist explained the Court's underlying rationales for the "not pressed or passed upon rule."

First, when questions are not raised on direct appeal, the record is likely to be inadequate since it is not compiled with those questions in mind. *Gates*, 462 U.S., at 218; *see also, Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

In addition to failing to raise a *Gerstein/McLaughlin* issue on direct appeal, Powell also failed to raise the issue before the district court.[4] The only motion to suppress filed by Powell was his motion to suppress information inadvertently obtained by a disinterested Deputy District Attorney from Petitioner's diary in connection with another case and that motion was based solely on Fifth and Sixth amendment concerns. The State decided not to

[4] It is worth noting that this Court maintained in *Stone v. Powell*, 428 U.S. 465, (1976), *reh'g denied*, 429 U.S. 874 (1976), that although Fourth Amendment claims deter unlawful police activity, where such claims could have been raised in state court, if later raised "indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Id.*, 428 U.S., at 491. The policy considerations behind the ruling included: "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Id.*, (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

pursue acquisition of Powell's diary (v. 10, 1578-1649, 1682).

Additionally, the only timely objection Petitioner raised at trial about his custodial statement was based on the best evidence rule (v. 20, 3614). Never, prior to his Petition for Writ of Certiorari to this Court, did Powell ever allege that his rights to a prompt probable cause determination had been violated. And although *McLaughlin* had yet to be decided, *Gerstein* was in effect and had been for over fifteen years.

"Judicial economy requires that issues critical to the conduct of the trial, such as grounds for suppressing evidence, be presented initially to the trial judge." *United States v. Whitten*, 706 F.2d. 1000 (9th Cir 1983), *cert. denied*, 465 U.S. 1100 (1984).

The assignment of error alleged by Powell to the Nevada Supreme Court was not that he had been denied protection under *Gerstein/McLaughlin*, but that he was not brought before a magistrate within the seventy-two hour standard required by Nevada Revised Statute (NRS) 171.178(3).[5]

[5] NRS 171.178 Appearance before magistrate; release from custody by arresting officer.

1. Except as provided in subsections 5 and 6, a peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.

Although there is no question that the Nevada Supreme Court possesses the statutory power to address

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2. A private person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available magistrate empowered to commit person charged with offenses against the laws of the State of Nevada or deliver the arrested person to a peace officer.

3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:

(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and

(b) May release the arrested person if he determines that the person was not brought before the magistrate without unnecessary delay.

4. When a person arrested without a warrant is before a magistrate, a complaint must be filed forthwith.

5. Except as provided in NRS 178.487, where the defendant can be admitted to bail without appearing personally before a magistrate, he must be so admitted with the least possible delay, and required to appear before a magistrate at the earliest convenient time thereafter.

6. A peace officer may immediately release from custody without any further proceedings any person he arrests without a warrant if the peace officer is satisfied that there are insufficient grounds for issuing a criminal complaint against the person arrested. Any record of the arrest of a person released pursuant to this subsection must also include a record of the release. A person so released shall be deemed not to have been arrested but only detained.

issues *sua sponte*, *see* NRS 178.602,[6] Petitioner's declaration that the Nevada Supreme Court properly found a straightforward violation of *McLaughlin* is inaccurate. Petitioner makes quite an assumption in his statement that the Nevada Supreme Court reached and decided the *McLaughlin* issue simply because they made note of it in their opinion. There is no indication in the Nevada Court's opinion that it was deciding a *Gerstein/McLaughlin* issue. Rather, as it pertains to the case at bar, *McLaughlin* was used as a reference in interpreting the "timely arraignment" requirement of NRS 171.178.

Additionally, state courts should be permitted to rest their decision on adequate and independent state grounds. *Gates*, at U.S. 221-222. This Court has given guidance on what constitutes independent state grounds.

> If a state court chooses merely to rely on federal precedent as it would on the precedent of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Michigan v. Long, 463 U.S. 1032, 1041 (1983). By doing so, both justice and judicial administration are greatly improved as long as the state court's decision clearly and expressly indicates that it is "alternatively based on bona

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[6] 178.602 Plain error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

fide separate, adequate, and independent grounds." *Id.* *See also, Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

On direct appeal, the Nevada Supreme Court, when confronted with the issue presented – failure to comply with NRS 171.178(3) – misapplied the *McLaughlin* standard for promptness in probable cause determinations to initial appearances. Petitioner alleges that the Nevada Supreme Court acknowledged a *Gerstein/McLaughlin* violation to have occurred in this case. (*See*, Brief for Petitioner, p. 4). The State disagrees. The Nevada Supreme Court merely used the forty-eight hour period[7] from *McLaughlin* to mandate, as a matter of state law, that the probable cause determination and the initial appearance shall both occur within forty-eight hours, a procedure that is not constitutionally required.

Furthermore, it is important to note that unlike Federal Rule of Criminal Procedure 5(a) and the practice followed in Riverside County, California, Clark County, Nevada does not conduct *Gerstein* probable cause determinations and initial appearances simultaneously. Rather, in Clark County, when a police officer makes a warrantless arrest, he completes a declaration of arrest form in which he sets forth the basis for the arrest (i.e., probable cause). This form is then taken by a corrections officer at the county jail to the justice of the peace designated to make a probable cause determination. If the magistrate determines that probable cause for continued detention exists, he checks the appropriate box on the form.

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[7] *Gerstein* and *McLaughlin* were only cited peripherally by the Nevada Supreme Court in a discussion as to what constitutes a timely initial appearance in Nevada.

It is clear from the record that the Nevada Supreme Court was not deciding a *McLaughlin* issue as it pertains to Powell but rather using it as guidance on the issue of what constitutes a timely initial appearance in Nevada. In so doing the Nevada Supreme Court created higher state law protection for a criminal defendant than the Constitution requires.

The foregoing, combined with a more than cursory reading of the Nevada Court's opinion, discredits Petitioner's argument that the court decided any Fourth Amendment issue with regard to Powell's case. In terms of the Nevada Supreme Court's discussion of any possible Fourth Amendment/*McLaughlin* issue, the most that can be said is that their conclusion was an advisory opinion,[8] intended only to have prospective effect.

Thus, where there are adequate and independent state grounds for a state supreme court's opinion, this Court is without subject matter jurisdiction to affect the state judgment.

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[8] The Nevada Court restated this Court's holding in *McLaughlin*, requiring that probable cause determinations be made within forty-eight hours of the arrest, but since *McLaughlin* was not at issue, the Nevada Court only intended for it to be applied in future cases.

B. The Retroactivity Test Espoused in *Griffith* Does Not Govern State Supreme Court Decisions That Enumerate a State Procedural Rule or That Are Based on Independent State Grounds

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court set forth a retroactivity analysis for federal constitutional applications. Specifically, when a new rule for the conduct of criminal prosecutions is cited, it is "to be applied retroactively to all cases, state or federal pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 328.

As previously stated, in Petitioner's case, the Nevada Court's discussion of *McLaughlin* was used exclusively to rule that both a probable cause determination and an initial appearance must occur within forty-eight hours as a matter of state law. Therefore, since the state supreme court was only enumerating a state procedural rule, they were allowed the freedom to apply a retroactivity analysis of their own choosing.

II POLICY CONSIDERATIONS UNDERLYING THE EXCLUSIONARY RULE STRONGLY MILITATE AGAINST ITS APPLICATION IN THIS CASE

Petitioner has requested that his custodial statement be suppressed. The remedial effect of the exclusionary remedy of the Fourth Amendment is to deter police misconduct in order to insure the reliability of confessions. *United States v. Leon*, 468 U.S. 897 (1984); *Withrow v. Williams*, ___ U.S. ___, 113 S.Ct. 1745, *reh'g denied*, 113

S.Ct. 3066 (1993). A violation of a defendant's Fourth Amendment right to be free from unreasonable seizures does not by itself mandate that information obtained during an unlawful detention be suppressed. "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. (citation omitted)." *Leon*, 468 U.S., at 906 (1984).

The exclusion of evidence in no appreciable way furthers the ends of the exclusionary rule where a law enforcement official is acting as a reasonable officer should under similar circumstances. *Id.*, 468 U.S., at 920. Thus, excluding the evidence obtained in no way affects future police conduct unless it is to make him less willing to do his duty. *Id.*

In *Illinois v. Krull*, 480 U.S. 340, 347 (1987), this Court expanded the *Leon* exception to the exclusionary rule, concluding that "[t]he application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Krull*, 480 U.S., at 349, *see also*, *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Read together, the *Leon* and *Krull* decisions stand for the proposition that where a police officer's conduct is objectively reasonable, in that his actions are consistent with the law at the time of the conduct, application of the exclusionary

rule does not beget the desired deterrent and therefore its application is inappropriate.[9]

There is absolutely no evidence in the record that Petitioner's detention provoked him to make a custodial statement that was not voluntary. Under the existing *Gerstein* rule, the states were left with a certain amount of discretion to determine what constituted a prompt probable cause determination. The fact that Powell is only now complaining of a *Gerstein* violation would seem to indicate that all the parties involved considered Powell's 1989 probable cause determination to have been prompt and within the law. Furthermore, the State was not in violation of NRS 171.178 until after the Petitioner had already voluntarily given the police his second statement, and by that time he had waived his right to a prompt initial appearance.

Even though *Miranda* warnings are a procedural safeguard necessary to protect against confessions obtained through illegal exploitations, standing alone, they are not invariably able to break the causal connection between the illegality and the confession. *Brown v. Illinois*, 422 U.S.

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[9] Other state courts have reached the *Gerstein/McLaughlin* issue and have declined to apply the exclusionary rule as a *per se* remedy. *State v. Tucker*, 626 A.2d 1105 (N.J. Super. A.D. 1993), *cert. granted*, ___ S.Ct. ___ (1993) (holding that the delay in bringing a defendant before a magistrate for a probable cause determination is but one factor to be weighed in determining the voluntariness of the statements made during the period of detention); *State v. Koch*, 499 N.W.2d 152 (Wis. 1993), *cert. denied*, 114 S.Ct. 221 (1993) (holding that where the delay was not for the purpose of gathering additional evidence to justify the arrest, suppression of the evidence is not appropriate).

590 (1975). In *Brown*, this Court discussed in detail its concerns regarding the implications of the holding in *Wong Sun v. United States*, 371 U.S. 471 (1963), and its effect on the exclusionary rule. The principal concern enunciated by this Court in *Wong Sun*, was whether statements and other evidence obtained after an illegal arrest or search should be excluded. This Court held that it applied the exclusionary rule primarily to protect Fourth Amendment guarantees in two respects: "in terms of deterring lawless conduct by federal officers," and by "closing the doors of the federal courts to any use of evidence unconstitutionally obtained." *Brown*, 422 U.S. at 599 (quoting *Wong Sun*, 371 U.S. at 486). Furthermore, although important, protection of one's Fifth Amendment right against self-incrimination was not the Court's paramount concern. *Id.*

In *Brown*, like *Wong Sun*, the fundamental questions were whether Brown's statements were obtained by exploitation of the illegality of his arrest and whether the *Miranda* warnings, by themselves, assured that the statements were of "sufficient free will as to purge the primary taint of the unlawful arrest." This Court held that *Miranda* warnings fail to inform a suspect of his Fourth Amendment rights, including his right to be released from unlawful custody following an arrest made without a warrant. Therefore, even if statements are found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. Thus, in determining whether a confession is voluntary under *Wong Sun*, the facts of each case must be appraised separately. Although the *Miranda* warnings are important, other factors such as: the temporal proximity of the arrest and the confession,

the presence of intervening circumstances, as well as the purpose and flagrancy of the official misconduct must also be considered.[10]

In light of the *Brown* decision, it is apparent that both Powell's Fourth and Fifth Amendment rights were adequately protected, despite the delay in his initial appearance. There is no question that Petitioner's statements were voluntary. Powell himself conceded this by not challenging the voluntariness on direct appeal. Moreover, the Nevada Supreme Court's findings of fact demonstrate that in addition to him being given the *Miranda* warnings and waiving them, the circumstances surrounding his inculpatory statements prove that they were the product of his own free will and, in fact, were meant to be exculpatory. (J.A. 7). Although upon first blush the four day period between arrest and the probable cause determination could appear to be a long period of detention, at the time of Petitioner's arrest, pursuant to NRS 171.178(3), a suspect could lawfully be detained for up to seventy-two hours, excluding non-judicial days [i.e. weekends] without prejudice resulting. Hence, excluding the intervening weekend, Petitioner's second statement was made well within the seventy-two hour standard allowed by the Nevada Statute at the time of his arrest.

The Nevada Court maintained that irrespective of when Powell appeared before a magistrate, he waived his

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[10] In his concurring opinion in *Brown*, Justice Powell stated that "in some circumstances, strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rules' deterrent purpose. *Brown*, 422 U.S., at 609.

right to remain silent and his right to counsel. (J.A. 7). By waiving those rights, he thereby waived his right to a timely arraignment. *Deutscher v. State*, 601 P.2d 407 (Nev. 1979). This statement is additional evidence of the Nevada Court's consideration of Petitioner's issue purely in terms of NRS 171.178(3), and not in terms of a *Gerstein/McLaughlin* violation.

The record in this case reveals that at all times the police conduct in this case was objectively reasonable, that said conduct was at all times within the bounds of the then-existing law, and that the delay was not for the purpose of gathering additional evidence to justify the arrest. Furthermore, the Nevada Supreme Court found that the totality of the circumstances indicated that Petitioner's custodial statement was made voluntarily after being advised of his *Miranda* rights. Considering these factors, application of the exclusionary rule would have no deterrent effect on future law enforcement misconduct. Therefore, this Court should refrain from applying the exclusionary rule and affirm the Nevada Court's judgment.

Moreover, Powell asks that the Nevada Court's judgment be reversed. (Brief for Petitioner at 15). Even assuming *arguendo* that the Nevada Supreme Court was required to apply *McLaughlin* retroactively, this Court is under no obligation to reverse Powell's conviction.

With respect to Petitioner's statement that his conviction should be reversed, the State would note that in *Gerstein* this Court specifically held that an illegal detention does not void a subsequent conviction. Moreover,

"although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein* 420 U.S., at 119.

Even if this Court finds that Powell's custodial statement should not have been admitted, the district court's admission of this statement was harmless error. The content of Petitioner's custodial statement was essentially the same as a previous statement he had made to the police. And there was evidence independent of Powell's statements to the police that Powell had hit the Allen children and that he claimed that the injury causing Melea's death resulted from her accidentally falling from his shoulders.[11]

Therefore, Petitioner's request for reversal should not be granted based on the fact that: (1) *Gerstein* itself does not require reversal in cases of prolonged detention; and (2) should this Court determine Petitioner's custodial

[11] At trial, Mrs. Eileen Richards testified that the day of Melea's injury she drove Petitioner and the child to University Medical Hospital. During the drive, Powell explained how Melea's injuries occurred. He said he had been playing with her when she slipped and fell from his shoulders, hitting the floor head first. (v. 18, 3134).

Ms. Sylvia Clark, a registered nurse at University Medical Hospital, testified that as Powell rushed Melea into the hospital he claimed the child had fallen from his shoulder the day before. (v. 18, 3136).

In addition, the two Allen children both testified that Petitioner frequently hit them and Melea. (v. 18, 3192-3193, v. 19, 3344-3346).

statement was improperly admitted at trial, any allegation of error is harmless.

CONCLUSION

Based on the foregoing, the judgment of the Supreme Court of Nevada should be affirmed.

December 1993

Respectfully submitted,

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FOR ARGUMENT

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Argument

1. The Crucial Questions of the Applicability of *Griffith v. Kentucky* and *County of Riverside v. McLaughlin* are Undisputed.

The voluminous briefing submitted by respondent and amici curiae does not contradict substantial portions of petitioner's argument. Petitioner submits that the following dispositive points of his argument are undisputed: First, that he did not receive a probable cause determination after his warrantless arrest within the forty-eight hour time limit prescribed by *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S.Ct. 1661 (1991); second, that *McLaughlin* was decided before petitioner's case was final on direct appeal; and finally, that under *Griffith v. Kentucky*, 479 U.S. 314 (1987), any decision on the merits of the *McLaughlin* issue in this case must be governed by the *McLaughlin* standard.

With respect to these points, petitioner relies upon the arguments presented in the opening brief. While we believe that these three undisputed points demonstrate petitioner's right to relief on the question presented in the petition for certiorari, we turn to the issues which respondent and amici do contest.

2. This Court Has Jurisdiction to Resolve the Question Presented on Certiorari Because the Lower Court Clearly Passed Upon the Federal Question.

Respondent's remarkable argument that the Nevada Supreme Court did not decide the *McLaughlin* issue in this case, and thus that there is no federal question before this Court, is groundless. The operative language in the court's decision could hardly be plainer:

> "The *McLaughlin* case renders NRS 171.178(3) unconstitutional insofar that it permits an initial

> appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours. Based on *McLaughlin we hold* that a suspect must come before a magistrate within forty-eight hours, including non-judicial days, for a probable cause determination."

JA 6, *Powell v. State*, 108 Nev. 700, 838 P.2d 921, 924 (1992) (footnote omitted; emphasis supplied). Petitioner frankly cannot understand how a decision "hold[ing]" that a federal constitutional precedent "renders [a state statute] unconstitutional" can be read as anything but a decision of a federal constitutional issue. It is equally clear that the sole ground relied upon by the Nevada Supreme Court for its refusal to apply *McLaughlin* to petitioner's case was its erroneous understanding of the controlling federal law on the retroactivity of constitutional rules. It is only after enunciating its "hold[ing]" under *McLaughlin* that the court's opinion denies petitioner the benefit of the "requirement mandated by *McLaughlin*", JA 6 n.1, 838 P.2d at 924 n.1, solely by reference to the pre-*Griffith* law of retroactivity. *Id.*

Comparison of the language used by the court below with language which this Court has viewed as showing that a federal constitutional ground for a decision is present demonstrates the error of respondent's position. For instance, in *Washington v. Chrisman*, 455 U.S. 1, 5 n.5 (1982), this Court relied upon the fact that the decision below "repeatedly refers to the Fourth Amendment and our cases construing it." And in *Cohen v. Cowles Media Co.*, ___ U.S. ___, 111 S.Ct. 2513, 2517 (1991), this Court viewed the fact that the state court

> "rested its holding on federal law could not be made more clear than by its conclusion that in this case enforcement of the promise of confidentiality under a promissory estoppel theory

> would violate defendants' First Amendment rights. [Citations]."

See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (lower court's decision "did not mention the [state] Constitution, citing instead this Court's First Amendment cases as controlling"); *Oregon v. Kennedy*, 456 U.S. 666, 671 (1982) ("fair reading of the decision below" showed reliance on federal law because cases cited for guiding general rule were decisions of this Court).

Here, the Nevada Supreme Court explicitly invalidated a state statute, "citing . . . this Court's [opinion in *McLaughlin*] as controlling", and the lower court's decision "repeatedly refers" to *McLaughlin*. The language used by the Nevada Supreme Court is unequivocal in its reliance upon federal law. Cf. *Charleston Assn. v. Alderson*, 324 U.S. 182, 185 (1945) (jurisdiction would be established on appeal if "it appears from the opinion of the state court of last resort that a state statute was drawn into question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity. . . . ") Under these circumstances, the only "fair reading of the decision below" is that it did in fact decide the federal question regarding the validity of its own law in light of *McLaughlin*.

In attempting to argue that the lower court did not decide the *McLaughlin* issue, but only a question of state practice under the first appearance statute, respondent contends that state law and practice do not in fact combine the probable cause determination with the first appearance under Nev. Rev. Stats. § 171.178, as posited in the Nevada Supreme Court's decision. Resp. Br. at 14. This argument is improper, since it is not supported by any citation to the record before this Court or to any other authority. Accordingly, this part of respondent's argument should be disregarded or stricken. Respondent

is not, of course, the arbiter of state law: to the extent that respondent is attempting to contradict the Nevada Supreme Court's understanding of state law, it is directing its argument to the wrong tribunal. Further, respondent offers no factual basis, in the record or otherwise, which would require this Court to reject the Nevada Supreme Court's view as to the character of its own state's proceedings.[1]

Similarly groundless is respondent's contention that the federal question is not before this Court because the

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[1] If respondent's contentions on this point are considered, they actually support petitioner's position. Assuming, as respondent asserts, that the probable cause determination is not combined with the first appearance under Nev. Rev. Stats. § 171.178, and that obtaining the probable cause review is simply a matter of placing the detention form before the magistrate, then the entire detention after the afternoon of petitioner's arrest was unnecessary and therefore illegal under *McLaughlin*. More significantly, this assertion also eviscerates any claim that the delay was justified by reasonable reliance on a presumptively valid state statute, under *Illinois v. Krull*, 480 U.S. 340 (1987). No Nevada statute explicitly refers to the judicial procedure for making the probable cause determination. If, as respondent asserts, the probable cause review is not delayed in order to allow combination with the first appearance, see *McLaughlin, supra*, 111 S.Ct. at 1669, then there conclusively could be no good-faith, reasonable reliance upon the time limit in the first appearance statute as a justification for the delay in the probable cause determination. Thus by asserting that the two proceedings are unrelated, respondent is effectively conceding that *Illinois v. Krull* is irrelevant to the disposition of this case.

In any event, as noted in petitioner's opening brief, the statute which provides for the first appearance prohibits "unnecessary" delay and it therefore does not ipso facto validate a seventy-two hour delay. Like the *McLaughlin* rule, the statute merely shifts the burden of showing unnecessary or justified delay at that point. Nev. Rev. Stats. § 171.178(1,3).

resolution of the *McLaughlin* issue in the Nevada Supreme Court opinion is dictum, merely advising the authorities of the changes in state procedure required by *McLaughlin*. As shown above, the language of the decision simply will not bear this interpretation. Moreover, respondent's position embraces a primary evil which results from purely prospective constitutional decisionmaking, namely the reduction of the decision to an advisory opinion. As this Court has recognized, giving the benefit of a new constitutional rule, at minimum, to the party before the court is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Stovall v. Denno*, 388 U.S. 293, 301 (1967). When a court announces a purely prospective rule, as the Nevada Supreme Court did here, the rule is in some sense always dictum: by definition the rule is not applied to the case before the court, so resolution of the issue cannot affect the disposition of the case; and, being unnecessary to the disposition of the case, the rule announced is always, in that sense, *obiter*.

The constitutional and policy objections to purely prospective decisionmaking have recently been analyzed at length, and petitioner will not repeat that analysis. *Harper v. Virginia Dept. of Taxation*, ___ U.S. ___, 113 S.Ct. 2510, 2520-2523 (1993) (Scalia, J., concurring); see also *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 2449-2450 (1991) (Blackmun, J., concurring in judgment); *People v. Hitch*, 12 Cal.3d 641, 655, 527 P.2d 361, 371 (1974); (Mosk, J., dissenting). Further, acceptance of respondent's position would result in the potential insulation of every erroneous decision of a federal constitutional issue: as long as the state court announces that its decision is prospective only, and thus merely dictum in the present case, there would never be a federal question presented for review. Such a rule would be an absurd anomaly.

Respondent also claims that the federal question is not properly before this Court because it was not "pressed or passed upon below," relying upon *Illinois v. Gates*, 422 U.S. 213, 219 (1983). Respondent's characterization of *Gates* is highly misleading, insofar as respondent implies that the issue must have been raised by the party in the lower court. Then-Justice Rehnquist's opinion for the Court in *Gates* explicitly recognized that the Court had "developed the rule that a claim would not be considered here unless it had been *either* raised or squarely considered and resolved in state court. [Citations]." *Id.* at 218 n.1. Thus it is simply untrue that the failure of the party to raise the federal issue below necessarily bars review by this Court. To the contrary, it is, literally, hornbook law that:

> "Where the highest state Court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Whitney v. California*, 274 U.S. 357, 360-61 (1927); *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). 'There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.' *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959). It is enough if the state court 'reached and decided it' (*Jenkins v. Georgia*, 418 U.S. 153, 157 (1974)) 'as though properly raised' (*Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971)). See also *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972); *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978); *Payton v. New York*, 445 U.S. 573, 582 n.19 (1980).
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> Once it is clear that the highest state court has actually passed on the federal question, any inquiry into how or when the question was raised in the state court is considered irrelevant to the exercise of the Court's jurisdiction."

R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice* § 3.18 at 131 (7th ed. 1993); accord, *Cohen v. Cowles Media Co.*, ___ U.S. ___, 111 S.Ct. 2513, 2517 (1991); see also *Ylst v. Nunnemaker*, ___ U.S. ___, 111 S.Ct. 2590, 2593 (1991).

This rule is based upon the respect which is due to the state's interest in the regularity of its own proceedings: if the highest court of the state does not view its interest in a procedural bar as sufficiently compelling to justify a refusal to address a federal issue, "a federal court implies no disrespect for the State by entertaining the claim." *Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979) (footnote omitted). Here, the Nevada Supreme Court did address the federal constitutional question and did not invoke any available procedural bar under state law. Accordingly, the issue is properly before this Court.

In attempting to avoid the obvious terms of the Nevada Supreme Court's decision addressing the constitutional issues on the merits, the state amici curiae ask this Court in effect to reverse *Harris v. Reed*, 489 U.S. 255, 261 (1989), and *Michigan v. Long*, 463 U.S. 1032 (1983). States Br. at 13-14. These cases require a "plain statement" that a state court decision rests upon an independent and adequate state ground before this Court will conclude that there is no basis for exercising its jurisdiction. Amici simply assert, without analysis, that the silence of the state court opinion as to any issue of procedural bar, and the failure to invoke any such ground for denying relief, should be construed as in fact a reliance upon the procedural bar. Nothing in this naked assertion suggests a basis in principle or policy for returning to the ad hoc analysis of the grounds of the state court decision in which this Court had to engage before *Michigan v. Long*.

The burden of resolving ambiguities in lower court decisions, which the "plain statement" rule is designed to avoid, would be multiplied endlessly if a party could raise as a bar to this Court's jurisdiction any state procedural or substantive rule which could be imagined, whether or not the lower court relied upon, discussed, or even considered that bar. This would re-introduce, in an aggravated form, precisely the same problems of doctrinal inconsistency, reliance upon unclear state law rules, and confusion and waste of resources that the "plain statement" rule is designed to avoid. *Michigan v. Long, supra,* 463 U.S. at 1039-1041. The radical suggestion of the state amici curiae should be rejected out of hand.

As shown in petitioner's opening brief, the Nevada Supreme Court clearly had the power to reach the constitutional issues under its own procedures. Neither respondent nor amici curiae claim that there is any basis in federal law for denying the Nevada Supreme Court the power to determine the *McLaughlin* issue sua sponte; and the propriety of the Nevada Supreme Court's power to do so under state law is a question over which this Court has no jurisdiction. E.g., *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945). Since the Nevada Supreme Court did decide the federal constitutional question, this Court plainly has jurisdiction to review the issue presented on certiorari.

3. The Existence of a Remedy Under State Law Renders Unnecessary any Consideration of the Remedy Required by the Federal Constitution

As shown above, there can be no reasonable dispute that the Nevada Supreme Court held there had been a federal constitutional violation in this case, and that its failure to give petitioner the benefit of that holding violated *Griffith v. Kentucky.* Under the circumstances of this

case, this Court's analysis should end there: it is not required to, and therefore should not, address any issue with regard to the scope of the federal exclusionary rule, because an apparently broader state law remedy exists. The State of Nevada

> " '[I]s free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined . . . . ' State law may provide relief beyond the demands of federal due process. . . . but under no circumstances may it confine petitioners to a lesser remedy. . . . "

Harper v. Virginia Dept. of Taxation, supra, 113 S.Ct. at 2520, quoting *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 44-52 (1990); accord, *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 277 n.14 (1984); see also *California v. Ramos,* 463 U.S. 992, 1013-1014 (1983). Here the Nevada Supreme Court found the existence of the federal constitutional violation and the existence of prejudice to the petitioner due to the introduction at trial of statements elicited as a result of the illegal detention. JA 5, 838 P.2d at 924. Under the state's own remedial law, this would require reversal of the conviction. See *id,* citing *Huebner v. State,* 103 Nev. 29, 32, 731 P.2d 1330 (1987); *Morgan v. Sheriff,* 92 Nev. 544, 546, 554 P.2d 733 (1976).[2]

This Court's jurisprudence compels respect for a state's right to impose its own remedy for a federal constitutional violation, independent of any remedy under federal law. *Welsh v. Wisconsin,* 466 U.S. 740 (1984)

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[2] Respondent does not argue that any purported waiver of *Miranda* rights would constitute a waiver of the state law remedy for a Fourth Amendment violation, cf. *Brown v. Illinois,* 422 U.S. 590, 603 (1975), nor that such a waiver would be effective without consideration of the effect of the illegal detention upon the voluntariness of any resulting statement. *Id.*

is strikingly similar to petitioner's case. There, the defendant was arrested in his home without a warrant for driving under the influence of an intoxicant and taken to the police station where he refused to submit to a breath analysis test. As a result of the refusal, the defendant's driving privileges were revoked and he was prosecuted for driving under the influence. The state supreme court held that the arrest was proper under the Fourth Amendment, but this Court found that the arrest was illegal under *Payton v. New York, supra,* 445 U.S. 573. State law provided broad remedies for the Fourth Amendment violation which were not dictated by the federal constitution: under state law, a refusal to submit to a breath test would be justified if the arrest was illegal and thus could not result in a license revocation, and evidence of the refusal could not be admitted against a defendant. *Id.* at 744-746. In reversing the judgment, this Court refused to consider what remedy the Fourth Amendment would require:

> "Because state law provides that evidence of the petitioner's refusal to submit to a breath test is inadmissible if the underlying arrest was unlawful, this case does not implicate the exclusionary rule under the federal constitution."

Id. at 746 n.5. This case is indistinguishable: "because state law provides" for the exclusion of petitioner's statement, the case "does not implicate" the issue of the proper remedy under federal law.

In an analogous case, *California v. Byers,* 402 U.S. 424 (1971), the state supreme court held that a statute requiring a motorist involved in an accident to stop and give his name and address violated the privilege against self-incrimination. It upheld the validity of the statute by imposing restrictions on the use of the information given, but it did not apply the statute, as limited, to the defendant who was convicted of violating it, because he could not have anticipated the limitation on the use of the

evidence he failed to provide. This Court reversed on the ground that the statute did not violate the federal constitution. It did not consider the validity of the restriction on use of the evidence required by the "stop and report" statute, however, because its decision of the federal question "removes the premise upon which the use restriction rested." *Id.* at 427 n.3. Similarly, the proper application of *McLaughlin* to this case under *Griffith v. Kentucky* "removes the premise" under which the Nevada Supreme Court denied relief under state law for the Fourth Amendment violation.

Application of *McLaughlin,* as required by *Griffith,* would thus result in reversal regardless of this Court's resolution of any issue with respect to the scope of the exclusionary remedy required by the federal constitution. This Court should therefore adhere to its consistent practice of not addressing constitutional issues which are unnecessary to the decision of the case before it. For instance, in *Standard Oil v. Johnson,* 316 U.S. 481 (1942), a state supreme court upheld a state statute imposing a tax on army post exchanges because the exchanges were not agencies of the federal government, under federal law, within a statutory exemption. This Court reversed on the ground that the exchanges were an arm of the federal government under federal law. It explicitly refused to address whether the imposition of a tax on a federal agency would violate the federal constitution because it had "no way of knowing" how the state court would have resolved that question if it had correctly found that the exchanges were federal agencies. *Id.* at 485. Here, this Court has "no way of knowing" how the lower court would resolve the issue of the appropriate remedy if it had correctly applied *McLaughlin* to petitioner's case, and resolution of that issue is therefore unnecessary to the disposition of this case. See also *Mills v. Rogers,* 457 U.S.

291, 305 (1982) (and cases cited therein) (unclear record as to whether state law grounds for relief would exceed minimal standards imposed by federal constitution justified avoiding unnecessary resolution of constitutional issues by remanding for further proceedings). Accordingly, the Court should vacate the judgment without addressing the scope of any exclusionary remedy under the federal constitution.

4. Violation of the *McLaughlin* Rule Requires an Exclusionary Remedy Under the Federal Constitution

Assuming arguendo that this Court should address the issue of the appropriate remedy under federal law for a *McLaughlin* violation, petitioner submits that exclusion of statements elicited as a result of an illegally-prolonged detention is constitutionally required. See *Brown v. Illinois, supra,* 422 U.S. at 603. The general rule, of course, is that evidence obtained in violation of the Fourth Amendment is subject to exclusion in order to discourage unlawful police conduct. *James v. Illinois,* 493 U.S. 307, 311 (1990). In deciding whether to recognize an exception to this general rule, this Court "has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *Illinois v. Krull, supra,* 480 U.S. at 347. Applying this analysis to the *McLaughlin* situation makes it clear that an exclusionary remedy is both appropriate and necessary.

The *McLaughlin* rule protects the suspect's interest in his or her own liberty. An initial warrantless arrest, based upon an assessment of probable cause made by an officer is the "often competitive enterprise of ferreting out crime," *Johnson v. United States,* 333 U.S. 10, 14 (1948), is

tolerated only as a concession to "the State's reasons for taking summary action. . . . " *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). Once the arrest has taken place, however, the need to dispense with the warrant requirement disappears, *id.* and any further detention which is unnecessary is constitutionally impermissible and therefore illegal.[3]

Thus it is appropriate to conceptualize the issue, from the vantage point prior to the illegally-prolonged detention, as putting the state to the choice of accomplishing the required probable cause review in a timely manner or releasing the presumptively-innocent arrestee: the most desirable remedy would be a mechanism to force the state either to conduct the required probable cause determination or "to let [the suspect] go." *Gramenos v. Jewel Companies, Inc.,* 797 F.2d 432, 437 (7th Cir. 1986) *cert. denied,* 481 U.S. 1028 (1987); *Wayland v. City of Springdale,* 933 F.2d 668, 670 (8th Cir. 1991); *Cooley v. Stone,* 414 F.2d 1213, 1213-1214 (D.C. Cir. 1969); *see Gerstein v. Pugh, supra,* 420 U.S. at 115.[4] At that point, however, no practical means of legal relief for the suspect exists, since any

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[3] The idea that unjustifiable and prejudicial delay may invalidate an action which would otherwise be entirely proper is by no means an exotic one. See *United States v. Lovasco,* 431 U.S. 783 (1977) (pre-accusation delay); *Barker v. Wingo,* 407 U.S. 514 (1972) (post-indictment delay). Thus this situation is distinguishable from those presented in *New York v. Harris,* ___ U.S. ___, 111 S.Ct. 1640 (1990), and *United States v. Montalvo-Murillo,* ___ U.S. ___, 110 S.Ct. 2072 (1990), because the detention involved here is not concededly legal.

[4] This situation is quite unlike the one presented in *United States v. Montalvo-Murillo, supra,* 110 S.Ct. at 2077-2079. There, the defendant was in concededly legal custody, but there was a delay in conducting a statutory bail hearing, at which the government showed that he should not be admitted to bail due to his dangerousness and risk of flight. This Court held that the remedy for the delay in the hearing was not release from custody. However, there is nothing in the Court's opinion which

litigation would necessarily consume more time than *McLaughlin* provides for making the probable cause determination. See *McLaughlin, supra,* 111 S.Ct. at 1667; *L.A.E. v. Davis,* 263 Ga. 473, 435 S.E.2d 216 (1993); see also *Cooley v. Stone, supra,* 414 F.2d at 1213-1214; cf. *United States v. Montalvo-Murillo, supra,* 110 S.Ct. at 2079 (adequate statutory remedies to enforce right to release or to bail hearing). Any remedy must therefore be retrospective and must be designed to deter the state from violating the constitutional standard.

The suspect's liberty interest in avoiding unnecessary detention is a powerful one. The strength of the suspect's liberty interest is important because any remedial rule fashioned by this Court will be aimed at affecting the behavior of the police with respect to individuals who have been arrested without probable cause as well as those arrested with probable cause. Respondent and amici implicitly assume that the judicial probable cause review is a mere formality which will always result in continuing the detention, but this is by no means the case: "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *United States v. Leon,* 468 U.S. 897, 914 (1984);

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suggests that the delay in the bail hearing rendered the continuation of custody illegal, which is precisely the point of *McLaughlin* and *Gerstein.* Further, recognition of the suspect's right to release or to a probable cause review, after the detention has served those interests of the state which are legitimate under *McLaughlin,* is a tool for analyzing the propriety of an exclusionary remedy for the *McLaughlin* violation. Petitioner does not suggest that the proper retrospective remedy for a *McLaughlin* violation is the defendant's release, after probable cause is found to exist by the magistrate; rather, the question is the propriety of an exclusionary remedy for evidence obtained as a result of the illegally-prolonged detention, in order to deter such illegal prolongation.

see also *United States v. Ventresca,* 380 U.S. 102, 109 (1965). Analysis of the propriety of the exclusionary remedy thus cannot focus primarily upon the particular conduct which has already taken place in the individual defendant's case, including, as here, a belated judicial determination that probable cause existed; rather, the rule "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . ." *United States v. Leon, supra,* 468 U.S. at 906, quoting *United States v. Calandra,* 414 U.S. 338, 348 (1974).

The functional aspect of any exclusionary rule is its effect upon the behavior of the police authorities.[5] An exclusionary remedy which is narrowly tailored, see *United States v. Morrison,* 449 U.S. 361, 364 (1981), to the damage likely to flow from *McLaughlin* violations will encourage the police to submit their judgment as to the existence of probable cause to the constitutionally-required scrutiny of a neutral and detached magistrate as soon as possible. A remedy following the pattern of *Brown v. Illinois* also poses no threat to the legitimate aims of law enforcement. The existence of an illegal detention alone would not result in imposition of a sanction, but would deprive the state only of evidence which it obtained through exploitation of an unnecessarily-prolonged detention. The means of avoiding any sanction –

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[5] The question of unjustified judicial delay in making the probable cause determination is not presented here. The state amici speculate that the date stamps on the detention form, ROA 11, may reflect the time the form was transmitted to the magistrate, and thus that any delay was caused by the judiciary rather than by the police. States Br. at 21. There is no support in the record for this speculation, and it is inconsistent with the practices prescribed by the police department itself. Las Vegas Metropolitan Police Department, Manual § 5/205.02(21) at 236 (1989).

by timely obtaining the required probable cause review or by not questioning the suspect until it is obtained – are easily available to the police. An exclusionary remedy here has its deterrent effect precisely where it is appropriate: it deters police from using an unnecessary prolongation of detention to place improper pressure on a suspect to speak.

This practice presents a real danger, documented by cases where suspects have been improperly detained in jail for a "long weekend to think about" the charged offense. *United States v. Jernigan*, 582 F.2d 1211, 1213 (9th Cir.), *cert. denied*, 439 U.S. 991 (1978); see *Gramenos v. Jewel Companies, Inc.*, *supra*, 797 F.2d at 437-438. In fact, this Court has recognized that a custodial detention is "likely to be exploited or unduly prolonged in order to gain more information," *Michigan v. Summers*, 452 U.S. 692, 701 (1981) and has "coercive aspects likely to induce self-incrimination." *Id.* at 702 n.15. Pallid euphemisms such as "detention" or "restraint" do not convey the reality and the coercive effect of being locked up in a highly threatening environment. See, e.g., Comment, *The Forty-Eight Hour Rule and County of Riverside v. McLaughlin*, 72 Boston U.L.Rev. 403, 408 n.36 (1993); *United States v. Watson*, 425 U.S. 411, 428 (1976) (Powell, J., concurring); *Moore v. Marketplace Restaurant, Inc.*, 745 F.2d 1336, 1449 (7th Cir. 1985); *Stokes v. Delcambre*, 710 F.2d 1120, 1124-1125 (5th Cir. 1983). An illegally-prolonged detention thus may be a flagrant violation of the Fourth Amendment. *Brown v. Illinois*, *supra*, 422 U.S. at 602-603.

The prospect of exclusion of evidence obtained through exploitation of an illegally-prolonged detention should deter the police from illegally delaying the probable cause review for such improper purposes. Petitioner's position is thus supported by *New York v. Harris*, *supra*, 110 S.Ct. at 1643-1644, where this Court recognized that

the prospect of exclusion of evidence in a home which has been entered in an illegal warrantless arrest should deter such illegal entries.[6]

The cost of such an exclusionary remedy is minimal. An exclusionary remedy in this context will not result in the suppression of "inherently trustworthy tangible evidence" obtained through an illegal search, *United States v. Leon*, *supra*, 468 U.S. at 907, because the state cannot claim that the evidence excluded is incontestably reliable. See *Arizona v. Fulminante*, ___ U.S. ___, 111 S.Ct. 1246, 1256 (1991) (plurality opinion) (involuntary statement unreliable); *Brown v. Illinois*, *supra*, 422 U.S. at 603.[7]

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[6] *Harris* also held that exclusion of a later statement, obtained during a concededly legal detention, would not deter illegal entries, because the statement was not produced by the manner of the arrest and thus was not a product of the illegality. That is essentially the reverse of the situation presented here: the propriety or impropriety of the initial warrantless arrest is not the focus of *McLaughlin*, and the officer's conduct in making that arrest is not the conduct sought to be deterred by fashioning an exclusionary remedy for a *McLaughlin* violation. See *Webster v. Gibson*, 913 F.2d 510, 513 n.7 (8th Cir. 1990) (distinguishing between illegal arrest and illegal prolongation of detention).

[7] Contrary to the assertions of amici, petitioner does not concede the voluntariness of his statements. The fact that this issue was not previously litigated is by no means a concession. To the extent that development of the factual record would be necessary to the assessment of the propriety of an exclusionary remedy under the federal constitution, further proceedings in the state courts would be appropriate on remand.

Because the illegality consists of the prolonged detention, and that illegal prolongation may contribute to the involuntariness of a statement, a finding of probable cause by a magistrate may not necessarily validate a later statement. Cf. U.S. Br. at 14-15 n.9. If the illegal period of detention has in fact had an affect on the defendant's will and thus on the voluntariness of a

No other sanction is adequate to ensure compliance with *McLaughlin*. As shown above, a suspect has no practical means of enforcing his or her legal right to release or to a probable cause review at the time the *McLaughlin* violation occurs. See also Pet. Br. at 23. One amicus advances the sterile argument that the existence of a civil damages remedy renders the exclusionary rule unnecessary. CJLF Br. at 23; cf. *Mapp v. Ohio*, 367 U.S. 643, 651-653 (1961). A recent case demonstrates the cynicism of this argument. In *Willis v. City of Chicago*, 999 F.2d 284 (7th Cir. 1993), a civil rights plaintiff was awarded $1.00 in damages for a detention which violated *Gerstein*, and, on appeal, the Court of Appeals reversed the award of attorney fees on the ground that the award of nominal damages did not support recovery of attorney fees. *Id.* at 287-290. The idea that the fear of such a civil damages remedy will provide the slightest motivation for a state to comply with the dictates of *McLaughlin* is pure fantasy. See also *Sivard v. Pulaski County*, 809 F.Supp. 631, 639-640 (N.D. Ind. 1992).

Respondent and amici also contend that an exclusionary remedy should not be recognized here because in allowing the delay the police relied in good faith on a presumptively-valid state statute. *Illinois v. Krull, supra*, 480 U.S. 340. As noted in petitioner's opening brief, the first appearance statute does not refer to the probable cause determination at all, nor does it conclusively validate an unnecessary seventy-two hour delay after arrest; and thus there could be no reasonable, good faith reliance upon it to justify the police actions here. Moreover,

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statement, the taint of that illegality may not be dissipated by the magistrate's probable cause finding, because it is the effect of the illegal portion of the detention which is relevant to the voluntariness inquiry.

respondent now contends that the probable cause review is not combined with the statutory first appearance at all, thus removing as a matter of law any basis for application of *Krull*. Further, since the Nevada Supreme Court, sua sponte, reached out to address an issue not raised by the parties, the record does not contain a factual basis for assessing the existence of good or bad-faith reliance upon any state statute, the reasonableness of any delay, or numerous other factual issues. See *Austin v. Hamilton*, 945 F.2d 1155, 1162 (10th Cir. 1991) (reasonableness of delay is question of fact); see also *United States v. Leon, supra*, 468 U.S. at 923 (assessment of good faith focuses on whether "reasonably well trained officer should rely on the warrant"). To the extent that resolution of these issues requires further factual development, that development must occur on remand, after the Nevada Supreme Court's erroneous judgment declining to give petitioner the benefit of *McLaughlin* is vacated.[8]

Finally, respondent argues that an exclusionary remedy should not be considered because any error in admitting petitioner's statements at trial was harmless. The question of the prejudicial effect of constitutional error is normally left to the lower court in the first instance, e.g., *Yates v. Evatt*, ___ U.S. ___, 111 S.Ct. 1884, 1895 (1991), and

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[8] Respondent may have an arguably legitimate complaint that the Nevada Supreme Court's disposition of the *McLaughlin* issue should have provided the state with opportunity to establish a factual basis for demonstrating that the delay was necessary, or that taint of the illegal detention had been attenuated, or the existence of any other ground for avoiding exclusion of the defendant's statement. This, however, is a reason for reversing the judgment, not for affirming it. Respondent therefore cannot press this position, since respondent did not file a cross-petition for certiorari on this issue. See, e.g., *Mills v. Electric Auto-Lite*, 396 U.S. 375, 381 n.4 (1970).

respondent offers no argument indicating why the Court should depart from its usual practice here. Respondent also offers no argument for the position that this Court should ignore the Nevada Supreme Court's finding of prejudice, to which this Court, following its consistent practice, should defer. Under these circumstances, the Court need not address respondent's argument on this point.

CONCLUSION

For the reasons stated above and in the opening brief, petitioner submits that the judgment of the Nevada Supreme Court should be vacated and the case remanded for further proceedings in light of *County of Riverside v. McLaughlin* and *Griffith v. Kentucky*.

Respectfully submitted,

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No. 92-8841

In the Supreme Court of the United States

OCTOBER TERM, 1993

KITRICH POWELL, PETITIONER

v.

STATE OF NEVADA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), which held that the Fourth Amendment generally requires a judicial determination of probable cause within 48 hours of a warrantless arrest, required suppression of a statement made by petitioner more than 48 hours after his arrest.

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INTEREST OF THE UNITED STATES

This Court held in *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), that the Fourth Amendment generally requires a judicial determination of probable cause within 48 hours of a warrantless arrest. The issue in this case is whether custodial statements voluntarily made by a suspect after his warrantless arrest must be suppressed if he does not receive a judicial determination of probable cause within 48 hours. The Court's analysis and resolution of that question is likely to affect the admissibility of evidence offered in federal criminal prosecutions. Accordingly, the United States has an interest in the proper resolution of the question presented.

STATEMENT

1. On Friday, November 3, 1989, at approximately noon, petitioner brought four-year-old Melea Allen to the University Medical Center in Las Vegas, Nevada. Petitioner told the attending nurse that he was the child's father, that he had been playing with her the previous evening, and that she had accidentally fallen and hit her head on the floor while he was slipping her over his shoulder. Melea, who was not breathing, was comatose and exhibited a number of bruises in different stages of healing, together with a deep laceration in her chin. The nurse suspected that Melea had been abused, and she accordingly telephoned the Las Vegas Police Department to report the incident. J.A. 2-4; 18 Record on Appeal (ROA) 3146-3154.

At approximately 12:30 p.m., Detective Alfred Leavitt arrived at the hospital to investigate the nurse's report. He first observed Melea in the emergency room and then found petitioner, who was in an adjoining waiting room. Petitioner agreed to give a tape-recorded statement to Leavitt. Asked whether he knew how Melea had been injured, petitioner responded affirmatively. He said, "I was playing with her and I lifted her up over my shoulder and she fell backwards and hit her head." He told Leavitt that the fall had occurred at approximately 12:30 p.m. on the previous day, and that Melea had complained after the fall that her neck hurt. Petitioner also stated that Melea's head was bruised by the fall, and that he did not seek any medical help until he found her, unconscious, on the bathroom floor a day later. He admitted that he punished Melea by spanking her on the buttocks when she wet her pants, but he denied

ever hitting her in the head or otherwise intentionally causing her any injury. The interview lasted approximately 10 minutes. J.A. 5; 20 ROA 3606-3652.

Petitioner was arrested later that day at approximately 3:00 p.m. He was charged with the offense of child abuse with substantial bodily harm. One of the arresting officers then completed a "Temporary Custody Record/Declaration of Arrest" form used by the Las Vegas Police Department. In that form, which was apparently completed within an hour of petitioner's arrest,[1] the officer set forth under penalties of perjury the essential facts of the child abuse crime as related by hospital personnel. At the conclusion of the factual recitation, the officer "pray[ed] that a finding be made by a magistrate that probable cause exists to hold [petitioner] for [a] preliminary hearing." A magistrate subsequently signed the form, indicating that he found probable cause to hold petitioner for the child abuse offense. 1 ROA 11. The Nevada Supreme Court found that the magistrate made that finding on November 7, 1989. J.A. 5.

On November 7, petitioner was interviewed by two Las Vegas police officers at the Clark County Detention Center. After being advised of his *Miranda* rights, he agreed to waive them and to give a recorded statement. In that statement, petitioner explained that he was not Melea's father, and that he had shared various abodes with Melea's mother and her three chil-

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[1] A date stamp on the form lists the time as 3:42 p.m. on Friday, November 3, 1989. 1 ROA 11. Although the Nevada courts did not find it necessary to determine precisely when the form was prepared, petitioner agrees (Br. 6) that from the date stamp it appears that the form was completed by 3:42 p.m. on the date of petitioner's arrest.

dren since meeting them at a Salvation Army shelter in September 1989. Petitioner also repeated his claim that Melea's head had been injured when she slipped off his shoulder, and he attempted to provide exculpatory explanations for her other injuries. J.A. 5, 7; 20 ROA 3615-3685.[2]

2. Melea died on November 8, 1989. J.A. 4. At petitioner's trial for her murder, the State introduced transcripts of his two recorded statements; petitioner objected to their admission solely on state evidentiary grounds. 20 ROA 3610-3622, 3628-3685. In addition, the State presented testimony from Melea's mother and others who were familiar with the family. That testimony established that during the pertinent period petitioner had sole custody of Melea during the daytime, while Melea's mother worked and her two older children were at school, and that Melea seemed to suffer numerous injuries while in petitioner's care. 17 ROA 3058-3060, 3066-3067, 3081-3084; 20 ROA 3482-3491, 3592-3595. The two older children recounted petitioner's abusive conduct toward them and toward Melea, describing how petitioner would shake Melea violently, squeeze her belly until she cried, and sit on her chest as she screamed in pain. 18 ROA

[2] When the officers asked petitioner about the injuries they had observed while visiting Melea in the emergency room, he explained that he had spanked her a few times on the buttocks for wetting her pants, and he admitted that he had once grabbed her by the cheeks and slapped her near the right eye in order to discipline her. Petitioner claimed, however, that Melea lacerated her chin when she slipped and fell in the bathtub, and that she sustained the bruises over each eye when she attempted to walk, and fell, immediately after he dropped her from his shoulder on November 2, 1989. Petitioner denied knowing how Melea sustained bruises to her neck, chest, and shoulder. 20 ROA 3671-3678.

3180-3196, 3229-3230; 19 ROA 3343-3356.[3] Finally, three forensic pathologists explained that the severe cumulative injuries suffered by Melea—a fractured spine, brain swelling and hemorrhaging, and a deep and purple bruising of the buttocks—could have occurred only through repetitive abuse. 16 ROA 2869-2978; 17 ROA 2991, 3003-3012; 21 ROA 3716-3760, 3835-3841; 22 ROA 3874-3882.[4] The jury found petitioner guilty.

3. The Supreme Court of Nevada affirmed. J.A. 2-21. On appeal, petitioner argued, apparently for the first time, that suppression of his two statements was required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and by a Nevada statute mandating that all persons arrested with or without a warrant be taken without unnecessary delay to a committing magistrate for a first appearance. See Nev. Rev. Stat. § 171.178 (1991). That statute provides that failure to present an arrestee "within 72 hours after arrest,

[3] Melea's sister, 14-year-old Melinda, also testified that petitioner telephoned her numerous times while he was awaiting trial. Petitioner initially sought to persuade Melinda to write letters exonerating him of any culpability in Melea's death. After the trial court issued an order barring him from calling Melinda, petitioner called her again, apparently to threaten her; during that call, petitioner told Melinda, "to tell you the truth I did kill your sister. Don't worry, you're next." 19 ROA 3380-3389.

[4] The medical experts agreed that a fall from an adult's shoulder to a hard floor would not have enough force to cause the type of severe head trauma exhibited by Melea. 16 ROA 2957-2966; 21 ROA 3839-3841; 22 ROA 3874-3882. One of the pathologists could compare Melea's head injuries to only one other case in his experience; in that case, a teenager had been propelled onto a concrete surface from a pickup truck traveling 45 miles per hour. 22 ROA 3875-3876.

excluding nonjudicial days" authorizes the magistrate to release the arrestee if the magistrate finds that the delay was unnecessary. Petitioner asserted on appeal that his first appearance occurred on November 13, 1989, more than 72 hours after his arrest.[5]

The court rejected the *Miranda* contentions, explaining that petitioner's first statement was not custodial, while his second one was made after he was advised of, and voluntarily waived, his *Miranda* rights. J.A. 4-8. With respect to petitioner's claim under the State's "prompt presentment" statute, the court noted that the purpose of that statute is to ensure that arrestees are advised of their Fifth Amendment rights. In light of that purpose, the court held, petitioner's waiver of his *Miranda* rights before making his November 7 statement also waived his rights under the statute. *Ibid.*

While discussing the prompt presentment statute, the court adverted to this Court's recent decision in *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), which held that the Fourth Amendment requires a judicial determination of probable cause within 48 hours of a warrantless arrest, unless a *bona fide* emergency or other extraordinary circumstance caused a longer delay. The Nevada court concluded that *McLaughlin* rendered the state statute "unconstitutional insofar [as] it permits an initial appearance up to seventy-two hours after arrest and instructs that nonjudicial days be excluded from the calculation of those hours." J.A. 6. The court took the position, however, that "the forty-eight hour requirement mandated by *McLaughlin* does not apply to the case at hand," because "[w]hen a case announces a new rule of law, the application of the rule is prospective unless it is a rule of constitutional law; and then it is only applied retroactively under certain circumstances." J.A. 6 n.1. Because of what the court deemed to be "the monumental negative impact which retroactive application would have on the administration of justice in Nevada," the court concluded that "the new rule announced in *McLaughlin* would not apply retroactively." The court observed that if *McLaughlin* were to be applied retroactively, "untold numbers of prisoners would be set free because they were not brought before a magistrate within forty-eight hours." *Ibid.*

[5] Petitioner apparently relied on the fact that the docket sheet for the case reflects an "initial arraignment" on November 13, 1989, after a formal complaint was filed in the case on November 8, 1989. See 1 ROA 4-5.

SUMMARY OF ARGUMENT

This Court held in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), that the Fourth Amendment requires a prompt judicial determination of probable cause following a warrantless arrest. In *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), the Court held that "prompt" generally means within 48 hours, and that absent extraordinary circumstances a longer delay presumptively violates the Fourth Amendment. Petitioner's argument in this Court is that the Nevada courts erred in failing "to apply *McLaughlin*" to him. We agree with petitioner that the Supreme Court of Nevada was wrong to say that *McLaughlin* is not retroactive as to convictions that have not yet become final. See *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). That error, however, does not help petitioner.

A. This Court has never held that a custodial statement obtained in the absence of a prompt proba-

ble cause determination is a suppressible "fruit" of that violation of the Fourth Amendment. The Court has applied the fruit-of-the-poisonous-tree doctrine when, as in *Brown* v. *Illinois*, 422 U.S. 590 (1975), the suspect who confesses was originally arrested without any probable cause, so that the arrest was unlawful *ab initio*. This case differs significantly from that model, however, because petitioner does not claim that he was arrested and held without probable cause. He claims only that the judicial officer was late in affirming the lawfulness of his arrest.

Because the judicial officer ultimately found probable cause based on information that was collected and recorded by the police immediately after petitioner's arrest, the timing of the finding of probable cause did not in any way affect petitioner's custody. Put another way, nothing would have happened differently in this case if the magistrate had read and approved the arresting officer's form on Friday, November 3, instead of doing so on Tuesday, November 7. Petitioner's custody was therefore not the product of the delay in the magistrate's probable cause determination. For that reason, petitioner's November 7 statement cannot be said to be the "fruit" of the violation of petitioner's Fourth Amendment rights, and the statement was therefore properly admitted into evidence.

B. Even if petitioner's statement could be considered the fruit of a Fourth Amendment violation, suppression of the statement still would not be required. In *Illinois* v. *Krull*, 480 U.S. 340 (1987), this Court held that the exclusionary rule does not apply to evidence obtained by police who act in objectively reasonable reliance upon a statute that is later found to violate the Fourth Amendment. In this case, a state

statute provided a safe harbor of three days, excluding weekends, for presenting an arrestee for his initial appearance. *Gerstein* emphasized that the States retained some discretion to delay the probable cause determination required by the Fourth Amendment so as to consolidate it with their existing first appearance proceedings, and it "indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." *Schall* v. *Martin*, 467 U.S. 253, 277 n.28 (1984). Reliance by state officers on the times set forth in the first appearance statute was therefore objectively reasonable, and the Friday-to-Tuesday delay that occurred here should not lead to suppression of the November 7 statement that was obtained from petitioner.

ARGUMENT

PETITIONER'S STATEMENT TO THE POLICE SHOULD NOT BE EXCLUDED FROM EVIDENCE

Petitioner presents the question whether this Court's decision in *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), should be applied to a case that was pending on direct appeal at the time *McLaughlin* was decided. The answer to that question is clearly yes. This Court held in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), that a constitutional decision of this Court will be applied to all cases that are not yet final at the time the decision is rendered. Petitioner's conviction was not final at the time *McLaughlin* was decided; he is therefore entitled to the benefit of that decision.[6]

While the Nevada Supreme Court was mistaken in characterizing *McLaughlin* as nonretroactive, that does not mean that the judgment below was in error. The judgment in this case turns on whether petitioner's statement to the police on November 7, 1989,

[6] The state court's decision that *McLaughlin* should not be applied to all pending cases appears to have been based, at least in part, on a misapprehension as to the consequences of such a ruling. There is no reason to assume, as did the state court, that an unlawful delay in finding probable cause would require that large numbers of convicted defendants "be set free because they were not brought before a magistrate within forty-eight hours." J.A. 6 n.1. Even if the defendants' pretrial custody was unlawful, that would not require that their subsequent convictions be vacated. See *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975). They would be entitled to relief only if the unlawful custody resulted in the obtaining and admission of prejudicial evidence that the State otherwise would not have obtained, and only if exclusionary rule principles required that evidence to be suppressed.

should have been excluded from evidence. In our view, there are two reasons—quite apart from the retroactivity of *McLaughlin*—that the statement was properly admitted: (1) the statement was not the fruit of the Fourth Amendment violation; and (2) even if it was, the state officials were entitled to rely on a presumptively valid state statute in making the probable cause determination, and thus the exclusionary rule should not be invoked to suppress petitioner's statement.

A. The Failure To Make A Probable Cause Finding Within 48 Hours Of A Defendant's Arrest Does Not Require Suppression Of His Statements If His Arrest Was Supported By Probable Cause

1. In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court considered a class action challenge to Florida procedures under which criminal defendants charged by a prosecutor's information might be detained for extended periods—often 30 days or more—without any judicial determination of probable cause. See *id.* at 106. The Court held the Florida system unconstitutional on the ground that the Fourth Amendment requires a "prompt" determination of probable cause following a warrantless arrest as a condition to "any significant pretrial restraint of liberty." *Id.* at 125.

The Court in *Gerstein* made clear that the Fourth Amendment does not require that the determination of probable cause be made in a formal, adversarial proceeding where the defendant is accorded the right to counsel and the right to introduce evidence or confront witnesses against him. After a warrantless arrest, the judicial officer is simply required to make the same judgment, under similar procedures, that he would make in deciding whether to authorize an ar-

rest warrant; as the Court noted, 420 U.S. at 120, probable cause in that context "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony."[7] Recognizing that "state systems of criminal procedure vary widely," the Court then left it to the States to decide how best to integrate the probable cause determination into their individual systems of pretrial procedures. *Id.* at 123-124.

With respect to the timing issue, *Gerstein* "did not * * * mandate a specific timetable" for the probable cause determination required by the Fourth Amendment, *Schall* v. *Martin*, 467 U.S. 253, 275 (1984), although the Court cited with approval a model code authorizing the probable cause determination to be made within two "court days" of the arrest, 420 U.S. at 124 n.25.[8] The Court shed some light

[7] The Nevada Supreme Court appears to have assumed that *McLaughlin* required that the defendant be accorded a personal appearance before a judicial officer within 48 hours, see J.A. 5-6 & n.1, when in fact it required only that a judicial determination of probable cause be made during that period. Under *Gerstein*, that determination could be made during the arrestee's initial appearance before the magistrate, but it could also be made on a written submission outside the arrestee's presence. While the right to a prompt probable cause determination is constitutional, the right to a prompt personal appearance before a magistrate is entirely a matter of state law, analogous to the nonconstitutional right to an initial appearance in the federal system under Fed. R. Crim. P. 5(a).

[8] The Court referred to a draft of the American Law Institute's Model Code of Pre-Arraignment Procedure. That draft provided that a person arrested without a warrant should be accorded a first appearance before a judicial officer within 24 hours of arrest; the magistrate would be authorized but not required to make a determination of probable cause at that

on the range of acceptable procedures in *Schall* v. *Martin*, *supra*, which involved a challenge to provisions of New York law authorizing preventive detention of accused juvenile delinquents. The New York law at issue provided that juveniles who were not released to the custody of their parents generally were entitled to an initial appearance before the Family Court immediately after arrest. See *Schall*, 467 U.S. at 257-258 n.5. The Family Court judge, however, was not required to determine probable cause at that appearance, and in fact probable cause was usually determined at a hearing conducted within three days of that initial appearance. *Id.* at 276-277 & n.27. The Court upheld those procedures as constitutionally adequate, noting that "*Gerstein* indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." *Id.* at 277 n.28.

The Court's most recent pronouncement on *Gerstein*'s requirement of promptness came in *County of Riverside* v. *McLaughlin*, *supra*. In *McLaughlin*, the Court reviewed an injunction that ordered two California counties to provide suspects with a probable cause determination within 36 hours of their warrantless arrests. The Court noted that "[g]iven that *Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures, some delays are inevitable," and therefore "the Fourth Amendment permits a reasonable postpone-

time. See Model Code of Pre-Arraignment Procedure § 310.1 (6) (Tent. Draft No. 5, 1972 and Tent. Draft 5A, 1973). In most cases, probable cause would be determined at an "adjourned session" to be held within two "court days" of the first appearance—*i.e.*, within five days of the arrest in the case of an intervening three-day weekend. *Id.* § 310.2(1).

ment of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system." *McLaughlin*, 111 S. Ct. at 1669.

The *McLaughlin* Court was concerned, however, that *Gerstein*'s standard of promptness was too vague to provide sufficient guidance, and had led instead "to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations." 111 S. Ct. at 1669. In view of the importance of providing "some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds," the Court adopted a 48-hour guideline to ensure that "a jurisdiction that provides judicial determinations of probable cause within [that time period] will, as a general matter, comply with the promptness requirement of *Gerstein*," and thus "will be immune from systemic challenges." *Id.* at 1670. Where an arrestee does not receive a probable cause determination within 48 hours, however, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Ibid.*

2. In light of *McLaughlin*, we assume for purposes of proceedings in this Court that petitioner's Fourth Amendment rights were violated by the Friday-to-Tuesday delay that occurred here.[9] It does not follow, however, that the delay requires suppression of the statement given by petitioner on Tuesday. To be subject to suppression, evidence must be considered the direct product (or "fruit") of the particular government conduct that invaded the Fourth Amendment.

That principle follows from a doctrine that the Court first recognized in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). In *Silverthorne*, the government had discovered documents in the course of an unlawful search and seizure and then sought to use its knowledge of the existence of the documents to compel the defendants to produce them under a subpoena. Speaking through Justice Holmes, the Court rejected that effort, explaining that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392. Justice Holmes went on to note, however, that facts that have been unlawfully discovered do not necessarily "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others." *Ibid.*

From Justice Holmes's early suggestion in *Silverthorne*, the Court has developed the modern Fourth

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[9] There are two open questions, not addressed below, that could defeat petitioner's claim that his Fourth Amendment rights were violated in this case. First, it is not clear from the record or from the state court's opinion that petitioner's November 7 statement was given prior to the magistrate's determination of probable cause on the same day. If the statement was made after the probable cause determination (and that may well have been the case, since the statement was made late in the afternoon of November 7), suppression of the statement would clearly be improper. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972). Second, because petitioner did not raise the Fourth Amendment issue in the trial court, the record does not reflect whether the State could meet its burden under *McLaughlin* to demonstrate a valid reason for delaying the judicial determination of probable cause more than 48 hours after petitioner's arrest.

Amendment doctrines that prohibit the suppression of evidence that is not the "fruit" of a constitutional violation, *i.e.*, evidence that was, or inevitably would have been, obtained irrespective of the violation.[10] As the Court recently explained:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Murray v. *United States*, 487 U.S. 533, 537 (1988) (quoting *Nix* v. *Williams*, 467 U.S. 431, 443 (1984)). In light of that principle, the Court has repeatedly

[10] The Court has used different terms to describe the absence of a sufficient causal connection between the violation and the obtaining of evidence: where the evidence was obtained as a result of investigative steps unaffected by the violation, the Court has characterized the evidence as the product of an "independent source." Where it is clear that the evidence would have been obtained regardless of the violation, the Court has referred to the evidence as the product of "inevitable discovery." See *Murray* v. *United States*, 487 U.S. 533, 537-539 (1988). And where the Court has reached the more general conclusion that the violation did not lead, in a sufficiently concrete way, to the obtaining of the evidence, the Court has referred to the evidence as not being the "fruit" of the illegality. The three doctrines all express the same underlying point: that absent a sufficient casual connection between the violation and the evidence in question, suppression is inappropriate.

held that suppression is not appropriate when the Fourth Amendment violation does not place the government in any better position than it would have occupied had the Constitution not been violated at all. See *Murray* v. *United States*, 487 U.S. at 541.

The Court's application of that principle in three recent cases is instructive here. In *United States* v. *Crews*, 445 U.S. 463 (1980), a robbery victim identified her assailant after he was arrested without probable cause. The Court assumed that the post-arrest identification should be suppressed, but it refused to suppress the victim's later in-court identification of her assailant as the fruit of the defendant's illegal arrest. The Court noted that the victim came forward before the arrest occurred, and therefore her presence at trial was not traceable to any Fourth Amendment violation. In light of the well-settled rule that even an arrest without any probable cause never entitles a defendant to "suppression" of his body from the trial, the Court unanimously concluded that the in-court identification could not properly be considered a "fruit" of the unlawful arrest. *Id.* at 472-473. As Justice Brennan put the point, "the Fourth Amendment violation * * * yielded nothing of evidentiary value that the police did not already have in their grasp." *Id.* at 475.

More recently, in *New York* v. *Harris*, 495 U.S. 14 (1990), the Court relied on *Crews* to reach a similar result. The defendant in *Harris* was arrested in his home. The arresting officers had probable cause to arrest him, but they did not comply with *Payton* v. *New York*, 445 U.S. 573 (1980), which forbids a suspect's arrest in his home other than pursuant to a warrant. After being taken from his home, the defendant made an incriminating statement in the

station house. The Court held that the station house statement was not a fruit of the *Payton* violation. The Court noted that Harris was not "unlawfully in custody" while he was detained at the station house, because "the officers had probable cause to arrest [him] for a crime." 495 U.S. at 18. Because Harris's statement was not "the fruit of having been arrested in the home rather than someplace else," it did not have to be excluded from evidence. *Id.* at 19.

Finally, in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), the Court rejected the claim that a failure to provide a suspect with a detention hearing within the time limits prescribed by the Bail Reform Act of 1984 entitled him to immunity from pretrial detention. The Court noted that the case was "similar to *New York* v. *Harris*, * * * in which we held that an unlawful arrest does not require a release and rearrest to validate custody, where probable cause exists." 495 U.S. at 722. In light of *Harris*, the Court concluded that "a person does not become immune from detention because of a timing violation." *Ibid.* Since the suspect would have been denied bail if the applicable time limits had been observed (as shown by the subsequent, if untimely, finding that he was a risk of flight and a danger to the community), "the noncompliance with the timing requirement had no substantial influence on the outcome of the proceeding" and no relief was warranted as a result of the violation. *Ibid.*

The analysis in these cases answers petitioner's claim here. Petitioner's arrest was based upon probable cause, as the magistrate found on November 7, 1989. His sole Fourth Amendment claim under *Gerstein* and *McLaughlin* concerns not the existence of probable cause or the validity of the magistrate's finding of probable cause, but simply the timing of the probable cause determination. Yet by analogy to Crews' unlawful arrest, the improper location of Harris's arrest, and the improper delay in Montalvo-Murillo's detention hearing, the delay in petitioner's probable cause determination did not affect the ability of the police to obtain a statement from petitioner on November 7.

To be sure, the November 7 statement was possible, at least in part, because petitioner was in custody at that time. But his custody was the product of probable cause, not the product of the delay in the magistrate's probable cause finding. The timing of the probable cause determination would have affected petitioner's custody only if there had been no probable cause to hold him.[11] Because there was probable cause to hold petitioner from the outset, and because the magistrate made the same probable cause finding on Tuesday that he would have made if he had acted two days earlier, none of the circumstances that could have affected petitioner's statement would have been changed if the probable cause determination had been accelerated, in anticipation of this Court's decision in *McLaughlin*.

This case is a particularly compelling one for applying Fourth Amendment "fruits" analysis to deny suppression. Within an hour of petitioner's arrest, the police had completed all the steps they needed to submit the probable cause issue to the magistrate for

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[11] No claim has been made, or could be, that petitioner's statement was the product of the failure to release him on bail before November 7. Petitioner was not released on bail at any point prior to trial, and there is no reason to believe that he would have been released if a bail hearing had been held immediately after his arrest.

decision. By that time, they had completed the form that contained the information submitted to the magistrate for a determination of probable cause. The magistrate, moreover, made the probable cause determination based on the information set forth on that form. Thus, this is not a case in which the police took advantage of a delay in the timing of the probable cause determination to buttress what had previously been an inadequate showing of probable cause.[12]

Petitioner's statement therefore was not a fruit of the failure to make a timely probable cause determination. Instead, it was a consequence of the proper custody in which petitioner was held as a result of the existence of probable cause. Suppression of petitioner's November 7 statement would put the prosecution in a worse position than if there had been no Fourth Amendment violation at all. To suppress petitioner's statement under these circumstances would be inconsistent with this Court's Fourth Amendment jurisprudence.

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[12] In that respect, this case is analogous to cases in which the lower courts, applying this Court's precedents, have refused to suppress evidence obtained during a warrantless entry, where the evidence in question inevitably would have been discovered pursuant to a valid warrant in any event. See, *e.g.*, *United States* v. *Herrold*, 962 F.2d 1131, 1140-1144 (3d Cir.), cert. denied, 113 S. Ct. 421 (1992); *United States* v. *Perrone*, 936 F.2d 1403, 1413 (2d Cir. 1991); *United States* v. *Mithun*, 933 F.2d 631, 635-636 (8th Cir.), cert. denied, 112 S. Ct. 201 (1991); *United States* v. *Register*, 931 F.2d 308, 311 (5th Cir. 1991); *United States* v. *Curtis*, 931 F.2d 1011, 1013-1014 (4th Cir.), cert. denied, 112 S. Ct. 230 (1991); *United States* v. *Halliman*, 923 F.2d 873, 880-881 (D.C. Cir. 1991) (Thomas, J.). See also *State* v. *Follinus*, 855 P.2d 863, 865 (Idaho 1993).

3. Petitioner contends (Br. 8-9) that the availability of suppression for his custodial statements must be assessed solely under the principles of "attenuation." Attenuation is another branch of the rule that evidence should not be suppressed unless there is a direct causal link between the Fourth Amendment violation and the challenged evidence, but "attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.' " *New York* v. *Harris*, 495 U.S. at 19. In this case, petitioner's claim fails *before* considering any question of taint, because "it is clear * * * that not even the threshold 'but for' requirement was met in this case." *Segura* v. *United States*, 468 U.S. 796, 815 (1984). In any event, however, petitioner's claim fails even if the case is analyzed as presenting a question of attenuation.

As applied to statements that result from a Fourth Amendment violation, the attenuation principle was first expounded by the Court in *Wong Sun* v. *United States*, 371 U.S. 471 (1963). In that case, the Court concluded that inculpatory statements by defendant Toy, which he made shortly after he was arrested without probable cause, were the "direct result" of that arrest, and therefore ordered their suppression. The Court explained that in the circumstances it was "unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* at 486. The Court reached a different conclusion, however, with respect to the confession made by defendant Wong Sun several days after his illegal arrest. "On the evidence that Wong Sun had been released on his

own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement," the Court held that "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" *Id.* at 491 (quoting *Nardone* v. *United States*, 308 U.S. 338, 341 (1939)).

The Court again applied the attenuation principle in *Brown* v. *Illinois*, 422 U.S. 590 (1975), which involved a defendant who had made incriminating statements several hours after he was arrested without probable cause. The Court concluded that the statements were not "sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Id* at 603. In reaching that conclusion, the Court refined the *Wong Sun* analysis by identifying a number of factors relevant to determining whether verbal evidence is sufficiently attenuated to purge the primary taint (*id.* at 603-604 (footnotes and citation omitted)):

> No single factor is dispositive. * * * The *Miranda* warnings are an important factor[.] * * * The temporal proximity of the arrest and the confession, the presence of intervening circumstances * * *, and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

In concluding that the taint was not purged in *Brown*, the Court noted that, while *Miranda* warnings had been given, the statements had been made within hours of the arrest, with "no intervening event of significance whatsoever." *Id.* at 604. More importantly, "[t]he illegality * * * had a quality of

purposefulness. The impropriety of the arrest was obvious," since "[t]he arrest, both in design and in execution, was investigatory." *Id.* at 605. See also *Dunaway* v. *New York*, 442 U.S. 200, 218 (1979) (reversal required where situation was "virtually a replica of the situation in *Brown*" in that the defendant "was seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance"); *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982) (same).

The factors identified by this Court in *Brown* establish that any taint that flowed from the *McLaughlin* violation in this case was insufficient to justify the exclusion of petitioner's November 7 statement. This is not a case in which a suspect "was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event." *Taylor* v. *Alabama*, 457 U.S. at 691. On the contrary, the officer had probable cause to arrest petitioner, and he acted within an hour of the arrest to complete the form necessary to secure a judicial determination of probable cause. The failure to obtain prompt judicial affirmance of the existence of probable cause in this case is worlds apart from the unlawful investigative arrests that were at issue in *Brown*, *Dunaway*, and *Taylor*.

Nor does the record indicate that petitioner's arrest or the conditions of his confinement were violent or otherwise designed to "cause surprise, fright, and confusion." *Brown* v. *Illinois*, 422 U.S. at 605. Almost four days elapsed between petitioner's arrest and his November 7 statement, and that statement was preceded by *Miranda* warnings as to his rights to silence and counsel, which he waived voluntarily

and without coercion.[13] As the Court has recognized, those warnings and their waiver, while not usually dispositive, "are an important factor * * * in determining whether the confession [was] obtained by exploitation of" the Fourth Amendment violation. *Brown* v. *Illinois*, 422 U.S. at 603; see also *id.* at 612 (Powell, J., concurring in part); *Taylor* v. *Alabama*, 457 U.S. 699-700 (O'Connor, J., dissenting). See also *United States* v. *Ceccolini*, 435 U.S. 268, 276-277 (1978).

In addition, petitioner indicated his willingness to speak to law enforcement authorities about his involvement in the events leading to Melea's death on November 3, 1989, before he was arrested. Thus, there is little reason to believe that petitioner's arrest, his detention, or the timing of the probable cause determination, alone or in combination, had any influence on his decision to waive his rights and make a voluntary statement on Tuesday, November 7. Petitioner did nothing on Tuesday that he had not already indicated he was willing to do before his arrest on Friday. In fact, his November 7 statement covered much the same ground, albeit in more detail, that had already been covered in his November 3

[13] Petitioner contends (Br. 10) that the length of detention should be analyzed differently in the case of *McLaughlin* violations than in cases like *Brown*, because the concern is not with the impact of the arrest itself, which can be said to dissipate over time, but with the impact of a prolonged detention, which can be said to increase over time. That difference, in petitioner's view, warrants the conclusion that the passage of time *aggravates* the taint of a *McLaughlin* violation. That submission overlooks the fact that in cases like *Brown* the arrest and the ensuing custody without probable cause are *both* illegal, and there surely can be no claim that imprisonment without probable cause becomes *less* grave the longer the suspect is held in custody.

statement. Under these circumstances, petitioner's voluntary statement on November 7, even if it could be said to be a fruit of the *McLaughlin* violation in some broad causal sense, was sufficiently independent of that illegality to be admissible.

B. Suppression Is Unavailable In This Case Because State Officers Could Reasonably Rely On The 72-Hour Provision Of State Law

Even if petitioner's November 7 statement is regarded as the unattenuated fruit of the delay in the magistrate's probable cause finding, the statement still should not be excluded, because the state officials were entitled to act in reliance on a presumptively valid state statute when they obtained a probable cause determination within three court days of petitioner's arrest, rather than within the 48-hour period later required by this Court in *McLaughlin*.

In *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987), this Court held that the exclusionary rule does not require the suppression of evidence obtained by police who act in objectively reasonable reliance on a statute that is subsequently found to violate the Fourth Amendment. The Court explained that, unless a statute is obviously unconstitutional, police officers cannot be expected to question the judgment of the legislature that passed the law. Nor can the exclusionary rule, whose purpose is to deter police misconduct, be expected to have a significant deterrent effect on the enactment of unconstitutional statutes by legislatures. In light of the high social costs exacted by suppression, the Court concluded that a search that was authorized by a statute later found unconstitutional could not give rise to suppression. See also *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979).

Those principles preclude the suppression of petitioner's November 7 statement. *Gerstein* allowed States to delay the probable cause determination required by the Fourth Amendment so as to consolidate it with their existing first appearance proceedings, and *Schall* v. *Martin* interpreted *Gerstein* to "indicate[] approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." 467 U.S. at 277 n.28. It was therefore reasonable for Nevada law enforcement officers to look to the limit provided for a first appearance by Nevada law—72 hours, excluding weekends—to guide their conduct with respect to the Fourth Amendment prior to this Court's decision in *McLaughlin*. See, *e.g.*, *Williams* v. *Ward*, 845 F.2d 374, 388-389 (2d Cir. 1988) (finding constitutional, in light of *Gerstein* and *Schall*, 72-hour detentions prior to probable cause determinations in New York City), cert. denied, 488 U.S. 1020 (1989).

Petitioner offers two arguments (Br. 11 nn. 7-8) to avoid the application of *Krull*. First, he claims that state officials could not reasonably have relied on the 72-hour provision, because the state statute prohibits unnecessary delay, and the delay in this case was not shown to be necessary. Second, he argues that a claim of good faith reliance was never advanced below, and that this case would therefore be "a wholly inappropriate vehicle for determining that issue."

To begin with, those arguments overlook the fact that *Gerstein* and *Schall* warranted state authorities in the belief that a delay in the probable cause determination to consolidate it with a first appearance would *not* be construed as impermissible. What is more, petitioner bears sole responsibility for the fact

that the record does not reflect the reasons for the delay that occurred here. He never raised the Fourth Amendment claim in the trial court or the Supreme Court of Nevada, so it is no surprise that the State failed to make a record as to the reasons for the timing of the probable cause determination.

Under the principles set forth in *Krull*, suppression would be inappropriate in this case, because Nevada officials could believe in good faith—two years before *McLaughlin* was decided—that the Friday-to-Tuesday delay that occurred here comported with the applicable Nevada statute, and that the statute was consistent with the Fourth Amendment requirements announced by this Court in *Gerstein* and *Schall*. To suppress here would punish state officials for adhering to a presumptively valid state statute and, as in *Krull*, would not serve the deterrent purposes underlying the Fourth Amendment exclusionary rule.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted.

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No. 92-8841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KITRICH A. POWELL,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Has a federal question been properly preserved for review in this Court?

2. Are *Gerstein* v. *Pugh* and *County of Riverside* v. *McLaughlin* to be enforced by means of excluding valid, probative, otherwise admissible evidence?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the defendant claims that relevant, probative evidence should be excluded from criminal trials on a ground with little or no bearing on the reliability of that evidence. Such an impairment of the truth-seeking function is contrary to the interest CJLF was formed to protect.

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1. Both parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

A copy of the arrest report is attached as Exhibit 4 to the Respondent's Brief in Opposition to the Certiorari Petition. According to the report, defendant/petitioner Kitrich Powell was arrested at 3:00 p.m. on November 3, 1989, a Friday, for felony child abuse of Melea Allen, age four. The report is time-stamped 3:42 p.m., less than an hour after arrest. On the bottom of the form there is a finding of probable cause signed by a judge dated Tuesday, November 7, but with no indication of the time.

There is no indication that Powell was present at the judge's determination of probable cause. His state appellate brief asserts that he was not presented to a magistrate until November 13. Brief in Opposition, Exhibit 1, p. 82 of Appeal Brief; *Powell* v. *State*, 838 P. 2d 921, 924 (Nev. 1992).

On November 3, the day of arrest, and again on November 7, the same day the judge found probable cause, Powell made statements to the police which included damaging admissions. *Powell*, 838 P. 2d, at 924. It is not clear whether the November 7 statement was made before or after the November 7 probable cause determination; for the sake of argument *amicus* will assume it was before. Powell was not in custody at the time of the November 3 statement. *Id*., at 925. He was advised of and waived his *Miranda* rights before the November 7 statement. *Ibid*.

Melea Allen subsequently died of her injuries. Powell was charged with murder, convicted, and sentenced to death. *Id*., at 923.

On appeal, Powell's delayed-appearance argument was based on a state statute. *Id*., at 923-924. However, the state court *sua sponte* addressed the impact of *County of Riverside* v. *McLaughlin*, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991) on state initial appearance procedure. Although the statute, Nev. Rev. Stat. § 171.178, makes no mention

of probable cause determination, the court found that the forty-eight hour standard of *McLaughlin* superseded the seventy-two hours plus weekend standard in the statute. 838 P. 2d, at 924. However, the court held this ruling did not apply retroactively. *Id*., at 924, n. 1. The court then went on to hold in the alternative that "Powell waived his right to an appearance before a magistrate within seventy-two hours." *Id*., at 925.

Represented by new counsel, Powell petitioned this Court for a writ of certiorari. The question presented in the petition was "May a state court decline to apply a controlling Fourth Amendment decision of this court to a case pending before it on direct appeal with impunity, in spite of *Griffith* v. *Kentucky*." Petition for Writ of Certiorari i. This Court granted the writ on October 4, 1993.

SUMMARY OF ARGUMENT

The court below did not address *sua sponte* the question petitioner now seeks to raise. The court only addressed the impact of *County of Riverside* v. *McLaughlin* on its decision, as a matter of state law, to combine the *Gerstein* hearing with the state initial appearance procedure.

Statements made during an interval when the criminal justice system is in violation of *Gerstein/McLaughlin* should not be excluded from evidence for that reason alone. The evidence is not obtained by exploitation of the violation. The costs of exclusion outweigh the benefits.

ARGUMENT

There are two assumptions contained within the question presented as framed by defendant/petitioner Powell. First, that the state court reached and decided a federal constitutional question, and, second, that *Gerstein*

v. *Pugh*, 420 U. S. 103 (1975) and *County of Riverside* v. *McLaughlin*, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991) are to be enforced by means of excluding otherwise admissible evidence. Neither proposition is self-evident.

I. The state court does not appear to have addressed a federal question *sua sponte*.

The opinion of the Nevada Supreme Court in the present case is not a model of clarity. Upon closer examination, however, it appears that the court was not addressing suppression of confessions as a remedy for *Gerstein/McLaughlin* violations, but rather determining how, in the future, the requirements of *Gerstein* and *McLaughlin* would be met within Nevada's statutory pretrial procedures. This discussion is within the context of deciding a claim made purely under state law.

Defendant contended in the state appeal, see *Powell* v. *State*, 838 P. 2d 921, 923 (Nev. 1992), and repeats in this Court, see Brief of Petitioner 8, that Nevada law excludes confessions when the state fails to comply with the state prompt arraignment statute, Nev. Rev. Stat. § 171.178. In other words, he contends that Nevada is one of the few states to follow a rule of exclusion similar to *McNabb* v. *United States*, 318 U. S. 332 (1943).

Few propositions are better settled than the nonconstitutional status of *McNabb*. Over and over, this Court has reiterated that *McNabb* is not constitutionally compelled and does not apply to the states. *Brown* v. *Allen*, 344 U. S. 443, 476 (1953). Whether Nevada has a state *McNabb* rule and whether the state court applied it correctly in this case simply are not federal questions. See *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991).

The state court begins its discussion of *McLaughlin* with this statement: "We initially note that the United States Supreme Court has provided additional guidance

on the issue of what constitutes a timely initial appearance." 838 P. 2d, at 924. However, it is very clear that *Gerstein* only permits and does not require states to combine the probable cause determination with the initial appearance. See *Gerstein*, 420 U. S., at 121-122; *McLaughlin*, 114 L. Ed. 2d, at 62, 111 S. Ct., at 1669. A holding that the *McLaughlin* deadline applies to the statutory initial appearance procedure is an implicit holding, as a matter of *state* law, that the two proceedings are to be combined.

Powell's statutory initial appearance was not overdue, under the terms of the statute, at the time he made his November 7 statement. Only a state law requirement to combine that proceeding with the *Gerstein* determination would render the combined proceeding overdue under *McLaughlin*. If the state court decides to follow the old rule of *Tehan* v. *Shott*, 382 U. S. 406 (1966) for the retroactivity of this state joinder rule, that is its prerogative. "Sound or unsound, there is involved in it no denial of a right protected by the federal constitution." *Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 364 (1932).

In the present case, the *Gerstein* determination and the initial appearance were not combined. The probable cause determination was made November 7, and the initial appearance was six days later. 838 P. 2d, at 924. Nowhere does the state court discuss the untimeliness of the probable cause determination, rather than the initial appearance, as a ground for exclusion. Defendant did not raise such a claim, and, as *amicus* will discuss in the next part, there is minimal authority for such a claim.

It appears, therefore, that a federal question regarding exclusion of the statement on the ground now asserted was neither raised by defendant nor addressed by the court below.

II. The causal link between a *Gerstein* violation and a confession is insufficient to warrant exclusion.

Defendant asserts that under federal law, a violation of *County of Riverside* v. *McLaughlin*, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991), by itself, absent any other constitutional issues, requires reversal of the conviction. Brief for Petitioner 8. *Amicus* submits that it does not. Not in this case. Not in any case.

Both *McLaughlin* and the underlying case of *Gerstein* v. *Pugh*, 420 U. S. 103 (1975) were civil class actions for declaratory and injunctive relief. *Gerstein*, 420 U. S., at 106-107; *McLaughlin*, 114 L. Ed. 2d, at 57, 111 S. Ct., at 1665. In neither case was exclusion of evidence as a remedy ever mentioned. The only reference to review of the criminal prosecution in *Gerstein* is contrary to defendant's position. "[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein*, 420 U. S., at 119.

The question of whether *McLaughlin* is even relevant, much less "controlling," remains open. The leading treatise on the Fourth Amendment cites only a handful of cases on the question. 2 W. LaFave, Search and Seizure, § 5.1(f), p. 425 (2d ed. 1987). After noting one argument against a suppression remedy, LaFave merely comments "It is not obvious, however, that such analysis is correct . . . ." *Ibid*. Neither is it obvious that the contrary argument is correct.

The question of whether *Gerstein* and *McLaughlin* are to be enforced by the exclusion of otherwise admissible evidence is both wide open and "fairly included" within the question presented. See Supreme Court Rule 14.1(a). It is a " 'predicate to an intelligent resolution' of the question on which [the Court] granted certiorari . . . ." *Cuyler* v. *Sullivan*, 446 U. S. 335, 342, n. 6 (1980). For the reasons that follow, *amicus* CJLF submits that the correct answer to the question is a simple "no."

A. Defining the Situation.

Before proceeding to the merits, a look at what is *not* at issue here would be prudent. This is not a case about involuntary confessions. Defendant notes, correctly, that extended detention can be used as a form of coercion. Brief for Petitioner 9. No one doubts that proposition. Indeed, for federal courts Congress has explicitly directed that this factor be considered. 18 U. S. C. § 3501(b)(1). But it is only one factor. Before the statement can be used as evidence, the prosecution must prove it was voluntary. *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972).

Neither is this a case about noncompliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) or any of the rules of "prophylaxis built upon prophylaxis" which have accrued since. See *Minnick* v. *Mississippi*, 498 U. S. 146, 166 (1990) (Scalia, J., dissenting). Such noncompliance is an independent ground for exclusion.

This is also not a case about people arrested without probable cause. The defendant can move for exclusion on that ground, and, if probable cause is found lacking, the exclusion decision is governed by *Brown* v. *Illinois*, 422 U. S. 590, 603-604 (1975). The present question only arises, then, if the defendant was arrested *with* probable cause, was advised pursuant to *Miranda*, and made a voluntary statement.

In what appears to be the only law review article on the subject, Professor George Thomas asserts that the present question involves all arrests in which evidence is revealed during the period of a *Gerstein* violation, regardless of whether there was probable cause to arrest. His reason for this assertion is that, by definition, there has been no probable cause determination at the time the evidence is obtained, and therefore probable cause is an unknown quantity. Thomas, The Poisoned Fruit of Pretrial Detention, 61 N.Y.U. L. Rev. 413, 417-418 (1986).

Professor Thomas' thesis does not withstand examination. The critical question is whether to admit the gathered evidence at trial. The time of trial, not the time of questioning, is the time at which we evaluate what is known and unknown. Defendant can challenge probable cause for the arrest by moving for suppression under *Brown* v. *Illinois*, *supra*. Only if that motion is unsuccessful, or if it is not made because probable cause is obvious, does a *Gerstein* suppression question arise.

If, at the time the evidence is offered, *Gerstein* is the only remaining ground for objection, then probable cause to arrest has either been established or conceded. The question of exclusion under *Gerstein* must proceed on the assumption that the arrest was made *with* probable cause.

Finally, the only confessions at issue are those made after the *Gerstein* promptness time has expired and before the probable cause determination has been made. Even under the extremely harsh rule applicable in federal courts,[2] a delay in presentment does not reach back to "taint" a statement made promptly after arrest. *United States* v. *Mitchell*, 322 U. S. 65, 69-70 (1944). It would be absurd to argue for an even more stringent rule to apply to the states. See *id*., at 67-68. In the present case, there is no *Gerstein* issue with regard to the November 3 statement.

At the other end of the interval, there is no issue as to statements made after the magistrate has found probable cause. Once the suspect has been legally committed by a judicial officer, evidence obtained after that point is not the "fruit" of the earlier police conduct. *Johnson* v. *Louisiana*, 406 U. S. 356, 365 (1972). At the most, then, we are dealing with an interval of time when judicial confirmation of probable cause is overdue. Is this

2. This rule is presently before the Court in *United States* v. *Alvarez-Sanchez*, No. 92-1812.

interval an "interrogation-free zone" from which any statements will be excluded at trial? That is the question.

B. "But For" Causation.

The Fourth Amendment addresses searches and seizures, not confessions. U. S. Const. Amdt. 4; cf. *id*., Amdt. 5. Any motion to suppress a confession on Fourth Amendment grounds must therefore depend on a "fruit of the poisonous tree" argument. See *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). Such an argument involves two issues. There must be a causal link such that the confession is indeed a result of the violation, and that link must be strong enough that exclusion is justified. The first issue is a question of logic; the second is "a matter of good sense." *Id*., at 341.

This Court's "cases make clear that evidence will not be excluded as 'fruit' unless the illegality is *at least* the 'but for' cause of the discovery of the evidence." *Segura* v. *United States*, 468 U. S. 796, 815 (1984) (emphasis added). In other words, there is a minimum requirement that if the violation had not occurred, the state would not have the evidence. If this logical causal link is missing, the evidence is admissible without getting into any questions of attenuation, strength of linkage, or cost-benefit analysis. "But for" causation is a necessary condition, though not a sufficient one, for suppression.

In *Segura*, the police had entered an apartment, and a warrant was later obtained with information already possessed by the police prior to that entry. The challenged evidence was obtained during the search with the valid warrant. *Id*., at 814. Since the evidence was obtained as a result of the legal warrant search and not the challenged warrantless entry, "not even the threshold 'but for' requirement was met in this case." *Id*., at 815.

To the same effect is *United States* v. *Crews*, 445 U. S. 463 (1980). In that case, the victim of the crime identified the defendant in court and had previously identified

him from a photograph taken during an illegal detention. *Id.*, at 467-468. The detention was simply not the cause of the in-court identification. *Id.*, at 473.

New York v. *Harris*, 495 U. S. 14 (1990) comes the closest to the present case. The police arrested Harris in his home with probable cause but without the required warrant. At the station, he admitted killing the victim. *Id.*, at 15-16; see *Payton* v. *New York*, 445 U. S. 573, 576 (1980) (warrant required for in-home arrest).

Harris had been illegally arrested, his custody was the result of that arrest, and the statement was the result of the custody, but even so the Court held that the statement was not the product of the illegality. Although the *manner* in which Harris was taken into custody was unlawful, that manner had no causal effect on the statement. It was not "the fruit of having been arrested in the home rather than someplace else." *Harris*, 495 U. S., at 19.

This facet of the *Harris* opinion is precisely analogous to the present case. There are several ways to comply with *Gerstein*, if permitted by local procedure, which would have no impact whatever on a suspect's willingness to confess, since the suspect need not even be aware of them. The police could obtain an arrest warrant, see *Gerstein*, 420 U. S., at 116, n. 18, have a *Gerstein* determination made *ex parte*, see *id.*, at 121-122 (confrontation not required), or have the suspect indicted by a grand jury, see *id.*, at 117, n. 19.[3] The police's failure to do any of these things promptly is in no way a cause of the suspect's decision to confess. The delay is a breach of the law, but the confession was not "come at by exploitation" of that breach. See *Harris*, *supra*, 495 U. S., at 19 (internal quotation marks omitted).

3. Indictment does not preclude questioning if defendant is advised of and waives his right to counsel, *Patterson* v. *Illinois*, 487 U. S. 285, 296-297 (1988), and the standard *Miranda* warning is sufficient, *id.*, at 298.

There is another facet of *Harris*, however, which could arguably be the converse of the present situation. The police's custody of Harris began illegally, but Harris was not unlawfully in custody at the time of the statement, because the police had probable cause to arrest him. It could be argued in the present case that the police's custody of Powell began legally but had become illegal by the time of the statement, due to the lapse of time without a probable cause determination.

To resolve this issue, it becomes necessary to delve deeper into the nature of a *Gerstein* violation. Does the violation consist of illegal custody or illegal denial of a judicial probable cause determination? Does the state violate the Fourth Amendment by keeping in jail people who have had no such determination or by denying such a determination to the people it keeps in jail?

In *Gerstein* and *McLaughlin*, this distinction made no difference to the substantive Fourth Amendment question and was not closely examined. The distinction was present, though, in the posture of the cases and the remedy granted.

Pugh and his co-plaintiff filed a civil class action for declaratory and injunctive relief. *Gerstein* v. *Pugh*, *supra*, 420 U. S., at 106-107. They "did not ask for release from state custody, even as an alternative remedy." *Id.*, at 107, n. 6. If they had, habeas corpus would have been the exclusive remedy. *Ibid.* From the beginning, then, the case was about a right to a judicial determination and not about legality of custody or release from custody. *County of Riverside* v. *McLaughlin*, *supra*, is similar. McLaughlin sought and received an injunction ordering the county to provide judicial determinations of probable cause within a certain period of time. 114 L. Ed. 2d, at 58, 111 S. Ct., at 1666. Again, this is a case of illegal denial of a determination, not illegal detention.

A hypothetical will illustrate the distinction more clearly. Suppose the police arrest a notorious serial killer.

They inadvertently fail to obtain a prompt probable cause determination, and they discover this error 49 hours after arrest. At the moment of discovery, what is the officers' duty?

If the violation is one of illegal custody and if an immediate *Gerstein* determination is not possible, then they would commit a knowing violation by keeping him in custody. The officers' duty would be to release him to kill again. A willful violation of this clearly established right would subject them to personal liability. See *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987). On the other hand, if the violation consists of failure to provide a *Gerstein* determination, the officers' duty would be to keep the killer in jail and obtain the determination as quickly as possible. In that event, while the county would be civilly liable for the negligent violation, there would be no intentional violation.

In the present case, Kitrich Powell was properly arrested on probable cause for the crime of beating a four-year-old girl into a coma (a charge later changed to murder when she died). *Powell* v. *State*, 838 P. 2d 921, 923 (Nev. 1992). To say that his custody became illegal upon the lapse of 48 hours is to say that the police were legally obligated to release him at that time. That is patently absurd.

Given that Powell was arrested without a warrant, the county was obligated under *Gerstein* to provide a prompt judicial determination of probable cause. With the hindsight of *McLaughlin*, we can now see that this duty was breached by making that determination on Tuesday, November 7, rather than Sunday, November 5, although that was not obvious at the time. Under the new regime of full civil retroactivity, see *Harper* v. *Virginia Dept. of Taxation*, 125 L. Ed. 2d 74, 86, 113 S. Ct. 2510, 2517 (1993), Clark County may be civilly liable for money damages. See Part III.D., *post*, at 22-24. But what has this delay in the determination of probable cause got to

do with Powell's appeal from his criminal conviction for murder? The answer, *amicus* submits, is that it is completely irrelevant.

Powell was legally in custody on November 7, when he made his statement. The magistrate made the probable cause determination the same day, evidently without Powell's presence.[4] Assuming for the sake of argument that Powell's statement preceded the determination, he made the statement at a time when the county was in violation of *Gerstein/McLaughlin*. There is, however, no causal link between the tardiness of the magistrate's *ex parte* determination and Powell's decision to make the statement.

A full adversary hearing with representation by counsel might indeed stiffen an arrestee's resolve not to talk, but *Gerstein* held quite squarely that such a hearing is not required. 420 U. S., at 123. If the minimal *Gerstein ex parte* determination had been made, a police officer might, in addition to reading the *Miranda* card, inform the arrestee "A judge reviewed your case yesterday and confirmed we had cause to arrest you." Is this information likely to make the suspect *less* willing to talk? It would seem more likely to have the opposite effect.

To make a case for suppression, a defendant must establish that but for the violation, the state would not have the evidence. The violation was the failure to make the minimal judicial determination required by *Gerstein* within 48 hours. Keeping defendant in custody was not a violation. Had the violation not occurred, i.e., had the magistrate made his *ex parte* determination two days earlier, the influences on defendant's decision to make his statement would have been no different. The state would

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4. According to Powell's state appellate counsel, he was not brought before a magistrate until November 13. Brief for Appellant in the Nevada Supreme Court 82, Exhibit 1 to Respondent's Brief in Opposition to the Certiorari Petition.

have the evidence anyway. The threshold requirement for suppression has not been met.

C. Strength of Linkage.

"Sophisticated argument may prove a causal connection between" a violation and the prosecution's evidence, but exclusion of the evidence does not necessarily follow. *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). If the defendant can clear the initial logical hurdle by establishing "but for" causation, the question remains whether the connection between the illegality and the evidence is strong enough to justify exclusion, "[a]s a matter of good sense." *Ibid.*

In making this "good sense" determination, a court must bear in mind that the defendant is asking that the trial process be made less reliable, less worthy of the public's confidence, and less likely to ascertain the truth. "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." *Id.*, at 340.

The most common type of "weak linkage" case is the "attenuation" line of cases typified by *Wong Sun* v. *United States*, 371 U. S. 471 (1963). Wong Sun was arrested without probable cause, arraigned, and released. He later returned to the police station of his own volition and made a statement. *Id.*, at 491. The illegality was the cause of the statement in the sense that but for the initial arrest, the chain of events leading to the statement would never have begun. Nonetheless, Wong Sun's act of free will had intervened. The connection was sufficiently "attenuated." *Ibid.* The statement was deemed not to have been obtained by *exploitation* of the illegality. Cf. *id.*, at 488 (use of codefendant's statement was exploitation).

A "closer, more direct link" is required when the evidence defendant seeks to exclude is the live, in-court

testimony of a witness. *United States* v. *Ceccolini*, 435 U. S. 268, 278 (1978). In *Ceccolini*, the police might never have known that a particular witness had relevant knowledge but for the illegal search. *Id.*, at 273. Even so, the linkage between the illegality and the evidence was held insufficient to justify exclusion. See *id.*, at 279-280. As a matter of common sense, it is difficult to say the state is exploiting the illegality when it offers the live testimony of a percipient witness who is more than willing to tell what she knows.

The root question in this line of cases is whether the evidence was obtained by exploitation of the illegality. With searches, this is always a serious danger, because the very purpose of a search is to gather evidence. In the case of an arrest without a warrant and without probable cause, the danger is also substantial, for it has been a common abuse to arrest people without probable cause for the specific purpose of getting a custodial confession. See, *e.g.*, *Brown* v. *Illinois*, *supra*, 422 U. S., at 605; *Dunaway* v. *New York*, 442 U. S. 200, 216 (1979).

However, the *Gerstein* exclusion question, by definition, arises only when the defendant was arrested with probable cause, and the illegality consists solely of the timing of the magistrate's confirmation of that fact. See *ante*, at 7-8. Unlike searches and unlike arrests "for questioning," a *Gerstein* violation is rarely, if ever, motivated by a desire to obtain evidence, since it is possible to comply with *Gerstein* without hindering the evidence gathering process in the least. See *ante*, at 10. *Gerstein* violations are caused by the failure of a complex system, which is comprised of many actors and subject to many demands and constraints, to place a sufficient priority on prompt determination of probable cause.

In this case, unlike *Ceccolini*, it is possible to say that, for this class of cases as a whole, the evidence is not obtained through exploitation of the illegality. Cf. 435 U. S., at 274-275. When the arrest is valid, the statement

is truly voluntary, *Miranda* and its accretions have been complied with, and the right to counsel, if attached, has been respected, the mere delay in judicial confirmation of probable cause, by itself, lacks the strength of connection to defendant's statement needed to justify the exclusion of valid, probative evidence.

III. The costs of an exclusionary remedy for *Gerstein* exceed the benefits.

A. The Exclusionary Rule.

Whenever a new setting for the application of the exclusionary rule is considered, the question of whether the heavy costs of exclusion are justified by the benefits must be addressed. The considerations involved in this question are often similar to those in the causation question,[5] but cost-benefit analysis is a distinct inquiry.

Unlike the "attenuation" cases, see Part II.C., *ante*, at 14-16, this Court's cost-benefit analysis decisions have not gone case-by-case, but have made the exclusion or no-exclusion decision for an entire category of cases. Evidence obtained from a warrantless illegal search or an arrest without probable cause, and not attenuated, is excluded from the prosecution's case in chief. *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961); *Wong Sun* v. *United States*, 371 U. S. 471, 485-486 (1963). Also, such evidence cannot be used to impeach a defense witness other than the defendant himself. *James* v. *Illinois*, 493 U. S. 307, 320 (1990).

Whenever an application is removed from the core of the exclusionary rule to any substantial degree, however,

5. Compare, for example, *Walder* v. *United States*, 347 U. S. 62, 65 (1954), refusing to let a defendant exploit suppression to commit perjury, with *Segura* v. *United States*, 468 U. S. 796, 815, n. 10 (1984), refusing to recognize under "but for" causation the fact that without the illegal seizure the defendants could have destroyed the evidence.

this Court has almost uniformly held that the costs outweigh the benefits. See *Stone* v. *Powell*, 428 U. S. 465, 489-495 (1976) (relitigation on habeas corpus); *United States* v. *Calandra*, 414 U. S. 338, 349-351 (1974) (grand jury); *Alderman* v. *United States*, 394 U. S. 165, 174-175 (1969) (third party standing); *Walder* v. *United States*, 347 U. S. 62, 64 (1954) (impeachment of defendant's direct testimony); *United States* v. *Havens*, 446 U. S. 620, 627-628 (1980) (impeachment of statements on cross-examination); *Michigan* v. *DeFillippo*, 443 U. S. 31, 37 (1979) (good faith reliance on ordinance); *United States* v. *Leon*, 468 U. S. 897, 913 (1984) (good faith reliance on warrant). Almost any weight removed from the benefit side or added to the cost side is sufficient to tip the balance. That fact indicates that even in the rule's core the balance is very close.

The sole basis for exclusion is the need to deter violations of the Fourth Amendment by removing the incentive to commit them. In the past, various other rationales have been advanced: that there was a connection between the Fourth Amendment and the Fifth, *Boyd* v. *United States*, 116 U. S. 616, 633 (1886); that the exclusionary rule is an inseparable part of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643, 651, 655-657 (1961); or that the courts somehow protect their own integrity by blinding themselves to the truth, see *Elkins* v. *United States*, 364 U. S. 206, 222-223 (1960). All these justifications have been abandoned. *United States* v. *Leon*, *supra*, 468 U. S., at 905-906 (included in Fourth, connected with Fifth); *Stone* v. *Powell*, *supra*, 428 U. S., at 485 (integrity). The sole question is whether the deterrent benefit is worth the heavy cost of suppressing evidence. *Leon*, *supra*, 468 U. S., at 913.

B. High Costs.

The costs of exclusion are well known to this Court. See, *e.g.*, *Leon*, *supra*, 468 U. S., at 907-908; *Stone* v. *Powell*, *supra*, 428 U. S., at 489-491. *Amicus* will therefore add only a few observations here.

First, the cost of exclusion cannot be measured in statistics. Arguments dismissing the costs as involving "only" some stated percentage of cases, see, *e.g.*, 1 W. LaFave, Search and Seizure, § 1.2(a), pp. 22-23, n. 6 (2d ed. 1987), miss the point. Justice is for real people, not bell-shaped curves. Each person's case is generally that person's only case. The fact that justice has been done in ninety-nine other cases does not make injustice in the hundredth case any less unjust. In the present case, the courts of Nevada will either be forced to blind themselves to the truth of the murder of four-year-old Melea Allen, or they will be permitted to do justice for Melea. There are no percentages.

Second, our system of laws depends entirely on the people's confidence in the law. A system perfect on paper will degenerate into anarchy or dictatorship overnight if the people do not believe in it. In living memory, no rule of law has done so much to diminish public confidence as the exclusionary rule. The sight of a single murderer going free because the constable blundered does incalculable damage to the public's confidence in the law.

Third, while this case does not involve physical evidence, it does involve a vitally important form of evidence. "A confession, if freely and voluntarily made, is evidence of the most satisfactory character." *Hopt* v. *Utah*, 110 U. S. 574, 584 (1884). Aside from drug possession cases, where physical evidence completes the entire case, a voluntary confession is usually the best and most complete evidence available. "Admissions of guilt are more than merely 'desirable,' [citation]; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*,

475 U. S. 412, 426 (1986). This is especially so in cases of murder, where the defendant has often eliminated the only other eyewitness. For courts to turn a deaf ear to evidence of such importance would require an exceedingly compelling justification.

C. Meager Benefit.

What makes this case unlike *Mapp* v. *Ohio*, *supra*, and much more like *Stone* v. *Powell*, *supra*, is the exceptionally meager benefit to be obtained at this high cost. Exclusion of evidence is effective to deter a violation only if the gathering of evidence was the motive for the violation. Gathering evidence usually is the motive for searches, and hence exclusion is thought to be an effective sanction.[6] See *Elkins* v. *United States*, 364 U. S. 206, 217 (1960). However, since defendant proposes extending the exclusionary rule to *Gerstein* violations, the likely motives must be examined afresh.

Once the police properly arrest a suspect, what would cause them to fail to comply with *Gerstein*? One reason probably involved in the present case is an inability to determine what *Gerstein* actually meant by "prompt." See *County of Riverside* v. *McLaughlin*, 114 L. Ed. 2d 49, 62, 111 S. Ct. 1661, 1669 (1991) (insufficient guidance). *McLaughlin* has fixed that problem to a considerable extent by drawing a presumptive line at 48 hours. *Id.*, 114 L. Ed. 2d, at 63, 111 S. Ct., at 1670.

A second reason may be lack of cooperation from the judicial branch. In another case presently before this Court, federal officers attempted to take a suspect before a magistrate as soon as they had booked him into federal

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6. Of course, the worst searches and seizures are those undertaken for harassment, seizing items with no semblance of evidentiary value for the proof of any crime. See, *e.g.*, *Stanford* v. *Texas*, 379 U. S. 476, 479-480 (1965). In such cases, the exclusionary rule is worthless, and the victim of the search must resort to civil remedies. See also *Terry* v. *Ohio*, 392 U. S. 1, 14-15 (1968).

custody, but they were told the magistrate's calendar was full. See Joint Appendix 25 in *United States* v. *Alvarez-Sanchez*, No. 92-1812. The exclusionary rule is meant to deter police misconduct, not judicial misconduct; it is ineffective for the latter. *United States* v. *Leon*, *supra*, 468 U. S., at 916-917. If the magistrate refuses to work weekends in violation of *McLaughlin*, see 114 L. Ed. 2d, at 63, 111 S. Ct., at 1670 (weekends count), the police officers' desire to question the suspect is unlikely to sway that decision.

A third possible motive for delay, in jurisdictions which require the *Gerstein* determination to be made at the same time counsel is appointed, see *McLaughlin*, *supra*, 114 L. Ed. 2d, at 62, 111 S. Ct., at 1669, is to postpone the appointment of an attorney who will surely advise the suspect not to talk. See *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (opinion of Jackson, J.). This possibility cannot be the basis of a constitutional rule of exclusion, however, because the joinder of the *Gerstein* determination with the appointment of counsel is not required. *Gerstein*, *supra*, 420 U. S., at 122. Such a rule would more likely motivate the jurisdiction to drop its local joinder requirement, thereby delaying appointment of counsel until a later stage of the process.[7]

A fourth possibility, and the most likely one in most cases, is an unintentional violation committed by a sluggish bureaucracy. That appears to have been the situation in *County of Riverside* v. *McLaughlin*, *supra*. There is no indication in the opinion that anyone intentionally delayed McLaughlin's initial appearance for the purpose of questioning him, or for any other purpose. See 114 L. Ed. 2d, at 57-58, 111 S. Ct., at 1665-1666.

7. Since there is no federal constitutional right to a preliminary hearing, see *id.*, at 119, the trial itself could be the first proceeding at which the defendant has a federal right to counsel.

Now that *McLaughlin* has set a standard, the "Dickensian bureaucratic machine," see *id.*, 114 L. Ed. 2d, at 72, 111 S. Ct., at 1677 (Scalia, J., dissenting), should normally "churn" at the required pace, but occasionally it will not. The critical question here is what effect an exclusionary rule would have on the churning speed.

An exclusionary rule would, at most, create an interrogation-free zone from the time the *Gerstein*/*McLaughlin* "promptness" limit expires until the time the *Gerstein* determination is made. See *ante*, at 8-9. An investigating officer in a jurisdiction which does not comply with *Gerstein* would have three options. First, he could hurry up his questioning of the suspect to a time before the *Gerstein* issue arises. Second, he could delay his questioning to a time after the *Gerstein* requirement is met. Third, he could try to push the processing of the case through the bureaucracy ahead of other cases.

Only the third option has any deterrent effect whatever on the constitutional violation. But how likely is this scenario? In a high-profile case, assigned to an investigator with influence within the department, it may well happen, but that is not the kind of case *Gerstein* and *McLaughlin* are principally concerned with. The concern is for the "law-abiding citizen wrongfully arrested . . . never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made." *McLaughlin*, 114 L. Ed. 2d, at 72, 111 S. Ct., at 1677 (Scalia, J., dissenting).

How would this victim of sloppy police work be helped by an exclusionary rule? He would not. Indeed, the case so low in priority that it was investigated badly is more likely to be the one "bumped" from the calendar to make room for the high-profile case.

In the routine case, it would be easier for the individual police officers to schedule their questioning around the interrogation-free zone than it would be for them to fight the system. An exclusionary remedy thus provides little

benefit toward preventing violations of the *Gerstein* rule. "[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used to effectively control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry* v. *Ohio*, 392 U. S. 1, 15 (1968).

Defendant asks this Court to prescribe a drug with minimal efficacy and major side effects. The first question a competent doctor would ask is whether a more effective, safer drug is available. Yes, one is.

D. Alternate Remedies.

Wolf v. *Colorado*, 338 U. S. 25, 28 (1949) affirmed that the substantive protections of the Fourth Amendment were included within the Due Process Clause of the Fourteenth. "But the ways of enforcing such a basic right raise questions of a different order." *Ibid*. After an extensive survey of jurisdictions, *id*., at 29-30, 33-39, Justice Frankfurter concluded for the majority that it is not "a departure from basic standards" to leave enforcement "to the remedies of private action . . . ." *Id*., at 31.

Wolf was overruled in *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The *Mapp* Court's decision to overrule *Wolf* was based largely on a belief that alternate remedies were inadequate. The *Mapp* Court was particularly impressed with the California holding in *People* v. *Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955), which declared that "other remedies have completely failed to secure compliance with the constitutional provisions . . . ." *Mapp*, 367 U. S., at 651 (quoting *Cahan*).

Much has changed since 1961. The most important development was the enactment in 1976 of 42 U. S. C. § 1988, authorizing reasonable attorneys' fees for prevailing plaintiffs in civil rights cases. Congress passed this law for the specific purpose of enabling plaintiffs to bring civil rights cases which had previously been economically infeasible. *City of Riverside* v. *Rivera*, 477 U. S. 561, 576

(1986) (plurality opinion). With section 1988, a civil suit need not generate a large money damage award to pay the lawyer, since the fees awarded need not be proportional to the recovery. *Ibid*.; *id*., at 585 (Powell, J., concurring).

In 1982, the people of California emphatically repudiated *Cahan* by constitutional amendment, declaring that the exclusionary rule violates the rights of victims of crime. Cal. Const. Art. I § 28(d). See *California* v. *Greenwood*, 486 U. S. 35, 44-45 (1988). They have chosen to rely solely on civil remedies for enforcement of the more expansive search and seizure protections of the state constitution.

In the present case, it is not necessary to reweigh the efficacy of alternate remedies for the typical illegal search of the kinds considered in *Wolf* and *Mapp*. For *Gerstein* involves a different kind of violation, and the differences are significant to the efficacy of the civil remedy.

A major concern in the search area has been that the victims of illegal searches are typically disreputable people to whom juries would be unsympathetic and unlikely to grant significant awards. See Comment, The Tort Alternative to the Exclusionary Rule in Search and Seizure, 63 J. Crim. L. C. & P. S. 256, 262 (1972); Orfield, Deterrence, Perjury, and the Heater Factor: an Exclusionary Rule in the Chicago Criminal Courts, 63 U. Colo. L. Rev. 75, 126 (1992). Since the legality of the search often has little to do with actual guilt or innocence, the potential plaintiffs will very often be criminals, thus justifying this concern.

Gerstein is different. There is a strong connection between the constitutional injury and actual innocence of the offense. The person arrested *without* probable cause is the one the *Gerstein* Court sought to aid. "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein* v. *Pugh*, 420 U. S. 103, 114 (1975). These

consequences are avoided only if the magistrate determines probable cause was lacking and releases the suspect. Suspects committed by the magistrate, on the other hand, spend the same length of time in jail whether the determination is made an hour, a day, or a month after arrest.[8]

Thus the class of people injured by *Gerstein* violations are those arrested by mistake or on flimsy evidence and belatedly released. There is no reason to believe that they are, as a whole, such a disreputable group as to be the objects of universal jury disdain. On the other hand, the group held for trial and seeking to exclude evidence consists primarily of people who have suffered little or no injury from the delay.

Furthermore, the case for damages is much easier to make in a *Gerstein* case than it would be in a traditional search case. Everyone can understand that being held in jail for three days without cause is a tangible injury deserving of compensation. After *County of Riverside* v. *McLaughlin*, *supra*, the case for liability is now simple as well. A plaintiff need only establish the dates and times of the arrest and of the *Gerstein* hearing, and the burden shifts to the defense. *County of Riverside* v. *McLaughlin*, *supra*, 114 L. Ed. 2d, at 63, 111 S. Ct., at 1670. Finally, the fact that *Gerstein* and *McLaughlin* were civil cases demonstrates that it is feasible to obtain counsel and bring civil suits in this area.

Mapp was decided twelve years after *Wolf*. The *McLaughlin* opinion is not even out in official advance sheets as of this writing. It is far too early to pronounce that civil remedies are hopelessly ineffective in enforcing *McLaughlin*. Cf. *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (opinion of Jackson, J.). Defendant's invitation to expand the exclusionary rule should be rejected.

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8. The timing of a bail-setting hearing may affect the time in jail, but that is a different issue.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

December, 1993

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

Supreme Court, U.S
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DEC 14 1993
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No. 92-8841

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

KITRICH POWELL, Petitioner

v.

THE STATE OF NEVADA, Respondent.

On Writ of Certiorari
To the Supreme Court of Nevada

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QUESTION PRESENTED

Amici, focusing on the end result sought by petitioner, respectfully submit that the question presented is:

Did the Nevada Supreme Court correctly decline to retroactively apply the Fourth Amendment exclusionary remedy against statements made by petitioner, who received a probable cause determination four days after his warrantless arrest, given that the "*McLaughlin*" rule, announced while petitioner's conviction was not yet final, requires a judicial probable cause determination within forty-eight hours of such an arrest?

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BRIEF FOR THE STATES OF UTAH, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*

Amici are states who, through their chief law enforcement officers, seek to bring criminals to justice on the strength of relevant evidence. *Amici* acknowledge a concurrent obligation to honor the Fourth Amendment right of all citizens to be free from unreasonable searches and seizures.

The latter obligation is commonly enforced through the judicially-created exclusionary remedy of *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961), whereby evidence obtained through Fourth Amendment violations is suppressed from use at criminal trials. *Amici* support a policy that reasonably limits that remedy's application to instances in which its purpose--the deterrence of Fourth Amendment violations, is well worth its cost--the loss of relevant evidence from criminal trials. In this brief, submitted under Rule 37.5, Rules of the Supreme Court of the United States, *amici* will demonstrate that no such benefit can be achieved by the remedy's application in this case.

STATEMENT OF FACTS AND PROCEEDINGS

The Crime

The Nevada Supreme Court summarized the evidence upon which Powell's trial jury found him guilty of murder. Over a period of about two months, Powell repeatedly physically abused Melea Allen, the four-year-old daughter of Powell's girl friend. The last of these episodes severely injured Melea's head and neck, causing her to lapse into a coma on November 3, 1989. At that time, Powell took Melea to a Las Vegas hospital, where she died on November 8, 1989. *Powell v. State*, 108 Nev. 700, 838 P.2d 921, 923 (1992) (J.A. 2-21).

The Two Statements to Police

In finding Powell guilty, the jury heard, and necessarily discredited, two statements in which Powell had sought to exculpate himself. The statements were made during two police interviews.

The first interview occurred at the hospital about an hour after Powell arrived there with Melea on November 3.

The interview lasted about forty minutes, during which Powell was twice allowed to leave, to smoke cigarettes (R. 814-16; 838 P.2d at 925, J.A. 7). In that pre-arrest interview, Powell stated that Melea's injury had been caused by an accidental fall from his shoulders during the previous day. He admitted that he occasionally spanked Melea to discipline her, but denied otherwise striking her or intentionally injuring her (838 P.2d at 924, J.A. 5; R. 814-16). At about 3:00 p.m., roughly an hour and a half after the interview, Powell was arrested for child abuse (Br. for Petitioner, at 7).

November 3, 1989 was a Friday. Under Nevada Revised Statutes section 171.178(3) (1986) (NRS 171.178), described by the Nevada Supreme Court as a "timely arraignment" rule, 838 P.2d at 925, J.A. 7, Nevada law enforcement authorities were then permitted seventy-two hours, exclusive of nonjudicial days, to bring an arrestee before a magistrate. While he was not thus "arraigned" on November 3, Powell acknowledges that an "arresting officer's declaration" form was completed that day, according to a date stamp, within an hour after his arrest (Br. for Petitioner, at 7). It is not known whether the "declaration of arrest" went straightaway to a magistrate at that time.

On Tuesday, November 7--still within the "timely arraignment" period of NRS 171.178--two police officers read the jailed Powell his silence and counsel rights, per *Miranda v. Arizona*, 384 U.S. 436 (1966). Powell waived those rights, and a second interview commenced (838 P.2d at 925, J.A. 7; R. 820, 3629-85).

During that post-arrest interview, Powell explained Melea's head and neck injuries consistently with his pre-arrest statement: she had accidentally fallen from his shoulders, he

claimed, on the day before he brought her to the hospital (R. 827, 3646). Powell asserted that various other, older injuries observed by medical personnel were caused by other, minor accidents, and by his physical discipline of Melea (R. 3671-78). He again denied that he had ever intended to injure Melea (R. 3683-85).

Also on November 7, a magistrate found probable cause to arrest Powell on the child abuse charge. It appears, and for purposes of this Court's review *amici* assume, that this finding was made ex parte (838 P.2d at 924, J.A. 5). The following day, after Melea died, the charge against Powell was changed from child abuse to murder. On that charge, Powell first appeared before a magistrate on November 13, 1989 (Powell's Opening Br. to Nevada Supreme Court, at 1; R. 4888). That "arraignment" was untimely under NRS 171.178.

The "Timely Arraignment" Argument

On appeal to the Nevada Supreme Court, Powell complained of the NRS 171.178 "timely arraignment" violation. He did not equate that violation to a Fourth Amendment violation, or invoke the Fourth Amendment in any way. And while he inaccurately asserted a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), in connection with one or both of his statements to police, he did not allege that either statement was involuntary. Nevertheless, in conclusory fashion, Powell argued that because of the NRS 171.178 violation, his "conviction should be reversed and the Appellant should be set free" (Opening Br. to Nevada Supreme Court, at 82-85; R. 4969-72).

The Nevada court rejected that sweeping demand, determining that Powell's pre-arrest statement was admissible because it was voluntarily made, in a noncustodial setting. 838 P.2d at 925, J.A. 7 ("he was not coerced or involuntarily detained in any way"). The court then held that Powell's November 7 post-arrest statement was also admissible because under Nevada caselaw, the NRS 171.178 "timely arraignment" requirement was waived when Powell, upon receipt of his "*Miranda*" warnings, agreed to speak to the police without counsel present. *Id.*, J.A. 6-7 (citing *Deutscher v. State*, 95 Nev. 669, 601 P.2d 407 (1979) (waiver of "*Miranda*" rights also waives timely arraignment, at which defendant would be informed of same rights), *vacated on other grounds*, ___ U.S. ___, 111 S. Ct. 1678 (1991)). As with the pre-arrest statement, the Nevada court found no record evidence that the post-arrest statement was involuntary. *Id.*, J.A. 7 (referring to both statements).

Importation of Fourth Amendment Issue

But before thus disposing of Powell's state statute-based argument, the Nevada court "initially note[d]" *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S. Ct. 1661 (1991), in which this Court held that a judicial probable cause determination must be made within forty-eight hours of a warrantless arrest, including nonjudicial days. 838 P.2d at 924, J.A. 5. The *McLaughlin* "forty-eight hour" rule, announced before Powell's conviction was final, gave a bright-line definition to this Court's earlier holding, in *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), that the subject of a warrantless arrest must "promptly" receive a judicial probable cause determination.

The Nevada court did not explain why it chose to "note" *McLaughlin*. Nevertheless, it ruled that "[t]he *McLaughlin* case renders NRS 171.178(3) unconstitutional insofar that it permits an initial appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours." 838 P.2d at 924, J.A. 6. That ruling evidently assumed that a post-arrest probable cause determination, and the arrestee's initial court appearance or "arraignment," would necessarily occur in the same proceeding. The court stated: "Based on *McLaughlin*, we hold that a suspect *must come before a magistrate* within forty-eight hours, including non-judicial days, for a probable cause determination." *Id.* (emphasis added).

In a footnote, the Nevada court then explained that its new, *McLaughlin*-based rule would not apply retroactively to Powell's case. This explanation was based upon a three-factor retroactivity analysis set forth in *Tehan v. United States*, 382 U.S. 406 (1966), that examines (1) the purpose of the new rule; (2) the reliance on the prior, contrary rule; and (3) the effect that retroactive application of the new rule would have on the administration of justice. 838 P.2d at 924 n.1 (citing *Tehan*), J.A. 6. Emphasizing the third factor, the Nevada court observed: "Were *McLaughlin* to be applied retroactively, untold numbers of prisoners would be set free because they were not brought before a magistrate within forty-eight hours." *Id.*

Powell now assails the Nevada court's non-retroactivity decision as erroneous under *Griffith v. Kentucky*, 479 U.S. 314 (1987). Despite the mistaken retroactivity analysis used by the Nevada court, *amici* will demonstrate that, for a number of reasons, the court's judgment, affirming Powell's conviction, should not be disturbed.

SUMMARY OF ARGUMENT

Powell's inconsistently-framed argument really asks this Court to apply the Fourth Amendment exclusionary remedy against the post-arrest statement he made to police, and to reverse his conviction. Aside from the alleged "prompt probable cause determination" violation, Powell alleges no other official misconduct that might call the admissibility of his post-arrest statement into question. The initial validity of Powell's arrest is uncontested. Thus only a quite narrow Fourth Amendment issue is presented.

On this issue, the Nevada court used an outmoded analysis to determine that the *McLaughlin* "forty-eight hour rule" for obtaining a probable cause determination should not apply retroactively to Powell. Under current analysis (which may arguably be inapplicable to this case), a new rule of criminal procedure applies to all cases pending on direct review, as was Powell's, when the rule is announced.

However, the Nevada Supreme Court's mistake does not compel relief from its judgment. As a threshold matter, the structure of the Nevada court's opinion reveals that its discussion of *McLaughlin*, along with its retroactivity analysis, was not dispositive of the appeal. The dispositive issue was the one actually presented by Powell--a state statutory violation and the appropriate remedy for the violation. Because the Nevada court decided that issue under independent state law, federal question jurisdiction is absent, and this Court should dismiss Powell's certiorari petition.

If jurisdiction is retained, the Nevada Supreme Court's judgment can be affirmed on several alternative grounds that were not identified by that court. Foremost among such

grounds is the principle, found in *Illinois v. Krull* and *Michigan v. DeFillippo*, that when state authorities act in conformity with law that has not yet been ruled unconstitutional, suppression of evidence derived from such action is inappropriate. Because Powell's probable cause determination was timely under then-existing statutory guidelines and this Court's pre-*McLaughlin* caselaw, Nevada authorities did nothing that the exclusionary remedy should deter, and Powell's post-arrest statement was admissible under the Fourth Amendment.

Next, as this Court held in *Brown v. Illinois*, even when authorities violate the Fourth Amendment, subsequent statements by a criminal suspect should not be suppressed if the violation was not flagrant or designed to elicit the statements. A similar "causation" analysis, in *New York v. Harris*, holds that where probable cause to arrest is established, error in the manner of making the arrest does not require the exclusionary remedy. Such analysis of this case demonstrates that Powell's post-arrest statement was not caused by, or the "fruit" of, any *McLaughlin* "forty-eight hour" violation, and therefore was properly admitted at his trial.

Further, use of the exclusionary remedy against Powell's post-arrest statement cannot advance deterrence of future *McLaughlin* violations. The clarity of *McLaughlin*, by itself, already serves as ample deterrence. It would also be very difficult, at this late date, to resolve the factual ambiguities necessary to prove a *McLaughlin* violation, and whether such violation stems from law enforcement misconduct or judicial error. A harmless error analysis--appropriate were a remand granted to clarify the facts--would probably defeat any prospect for a new trial. Therefore, an

evidentiary remand at this point would waste judicial resources, and should not be granted.

The arguments for affirmance highlight the important Fourth Amendment principle that a criminal defendant who wishes to invoke the exclusionary remedy must do more than merely prove some Fourth Amendment violation. He or she must also demonstrate that the exclusionary remedy--not itself a constitutional right--is appropriate under the circumstances of the case. Re-articulation of this principle is needed to guide future litigants and courts, and is urged by *amici*.

ARGUMENT

PETITIONER CANNOT INVOKE THE EXCLUSIONARY REMEDY FOR THE FOURTH AMENDMENT "FORTY-EIGHT HOUR RULE" VIOLATION THAT HE ALLEGES

A. Powell Seeks to Suppress a Voluntary Statement, Solely Upon Narrow, Fourth Amendment "Prompt Probable Cause Determination" Grounds.

The issue before this Court should be made clear. Powell presents only a Fourth Amendment "prompt probable cause determination" issue, under *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S. Ct. 1661 (1991), regarding the four-day interval between his warrantless arrest and the ex parte, judicial probable cause finding that upheld the arrest. *Amici* agree that Powell's "timely arraignment" right, and the question of whether he waived that particular right (Br. for Petitioner, at 19-23), are not before this Court. See *McLaughlin*, 111 S. Ct. at 1668-71, and *Gerstein v. Pugh*,

420 U.S. 103, 122-25 (1975) (probable cause determination and other pretrial proceedings, serving different functions, may be combined or separate).

The relief sought by Powell should also be clarified. In the conclusion to his brief, he formally asks only for a remand to the Nevada Supreme Court "for further proceedings" in light of *McLaughlin* and *Griffith v. Kentucky*, 479 U.S. 314 (1987) (Br. for Petitioner at 24). But Powell elsewhere asserts--although in self-contradictory fashion--that "reversal of the conviction," and "the exclusionary remedy of the Fourth Amendment or a remedy under state law" are "require[d]" or "appropriate" for the allegedly unreasonable delay in the probable cause determination after his arrest (Br. for Petitioner, at 1, 8, 10, 11). *Amici* do not perceive this Court to be at liberty to order an undefined "remedy under state law" for the *federal* violation alleged by Powell.

The relief Powell actually seeks, *amici* believe, is the federal, Fourth Amendment exclusionary remedy, suppressing the statement he made to Nevada authorities during the allegedly "unreasonable" delay before his probable cause determination. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by state authorities by violation of Fourth Amendment is subject to exclusionary remedy); *Brown v. Illinois*, 422 U.S. 590 (1975) (ordering suppression of incriminatory statements given after an illegal arrest). Only that post-arrest statement--not the pre-arrest statement taken at the hospital--is encompassed in Powell's argument (Br. for Petitioner, at 8). Suppression of that "prejudicial" post-arrest statement, Powell assumes, will require that he receive a new trial.

Powell does not allege any other type of constitutional transgression that might call the admissibility of his post-arrest statement into question. The Nevada Supreme Court found that Powell received and voluntarily waived his "*Miranda*" rights before making that statement, and found no indication that the statement itself was involuntary. 838 P.2d at 925, J.A. 7.

Despite that uncontested finding, Powell broadly alludes to the "oppressiveness" of "illegal custody," and to the detrimental "effect of prolonged detention upon the reliability of statements elicited from a suspect" (Br. for Petitioner, at 11). However, Powell has never alleged that his post-arrest statement was in fact involuntary under the "totality of the circumstances" analysis of *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-27 (1973). Therefore, his evident attempt to insinuate an "involuntariness" argument into this certiorari proceeding should be rebuffed. Cf. *Withrow v. Williams*, ___ U.S. ___, 113 S. Ct. 1745, 1750-54 (1993) (distinguishing values served by suppression of evidence under Fourth Amendment, Fifth Amendment, and Due Process voluntariness principles).

Finally, Powell does not argue that his arrest was unsupported by probable cause. A magistrate did find such probable cause, and that finding would be accorded great deference even if Powell had contested it. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). The only "illegal custody" that Powell alleges therefore began at roughly 3 p.m. on Sunday, November 5--forty-eight hours after his warrantless arrest and therefore exceeding the later-prescribed "reasonable delay" period of *McLaughlin*. It ended when, on November 7, the magistrate found probable cause.

In short, the issue presented by Powell is even narrower than he admits (Br. for Petitioner, at 3). He demands an exclusionary remedy against a voluntary statement, made during a two-day period when his custody would have been presumptively unreasonable under *McLaughlin*, 111 S. Ct. at 1670. As follows, Powell's demand should be rejected.

B. Because the Challenged Judgment Turned on State Law, Rather than the Nevada Court's Retroactivity Analysis, This Certiorari Proceeding Should be Dismissed.

As a threshold matter, this Court should reconsider its grant of certiorari to review Powell's argument that the forty-eight hour rule of *McLaughlin* ought to be retroactively applied to his benefit. That argument, rejected by the Nevada Supreme Court, was not dispositive of its ultimate judgment.

Powell has a well-supported point regarding retroactivity. The retroactivity analysis of *Tehan v. United States*, 382 U.S. 406 (1966), used by the Nevada Supreme Court in this case, is identical to that of *Linkletter v. Walker*, 381 U.S. 618 (1965). That analysis has been supplanted by *Griffith v. Kentucky*, 479 U.S. 314 (1987). Now, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 328. The Nevada court mistakenly failed to recognize this.

The Nevada court's mistake arguably demonstrates a flaw in the *Griffith* rule, or at least a need to limit its reach.

The rule's application to this case, as urged by Powell, might compel retroactive appellate suppression of his post-arrest statement, and perhaps a new trial. This is unwarranted, especially in a case like this one, where the alleged Fourth Amendment error is wholly unrelated to the reliability of trial. See *Stone v. Powell*, 428 U.S. 465, 489-91 (1976). To avoid such a result, it could be argued that the *McLaughlin* forty-eight hour requirement does not address the "conduct of criminal prosecutions," and therefore falls outside the ambit of the *Griffith* retroactivity rule. Cf. *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) (post-arrest probable cause determination is not a "critical stage" in a prosecution).

But such argument need not be addressed, because the Nevada Supreme Court's retroactivity analysis was not actually dispositive of Powell's appeal. The dispositive analysis was the NRS 171.178 "timely arraignment" analysis, and was based entirely upon adequate, independent state law grounds.

Amici are mindful of this Court's preference for a "plain statement" that a state court's judgment rests upon adequate and independent state law grounds. See *Michigan v. Long*, 463 U.S. 1032, 1044 (1983). No such statement appears in the Nevada court's opinion. However, the "plain statement" rule only applies where the independent state ground is not otherwise "clear from the face of the opinion." *Long*, 463 U.S. at 1040-41; *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). In this case, the structure of the Nevada court's opinion, and its *silence* as to any matter that might have lifted the normal procedural bar to Powell's *McLaughlin* argument, make it clear that the court's judgment rests upon independent state law.

An alert reading of the opinion reveals that the Nevada court did not regard any Fourth Amendment issue to be properly before it. Instead, it "noted" *McLaughlin* in the section of its opinion that bears the heading "*Delay in Appearing Before a Magistrate*." 838 P.2d at 923, J.A. 4 (italics in original). That heading identifies the "timely arraignment" issue that was actually advanced in Powell's briefs to that court (Opening Br. to Nevada Supreme Court, at 82; Reply Br., at 1; R. 4969, 5107). The *McLaughlin* discussion merely prefaced the dispositive analysis. That analysis relied entirely upon state law, interpreting the "timely arraignment" requirement of NRS 171.178, and defeated Powell's argument on appeal.

In other words, the Nevada court "noted" *McLaughlin* in dictum or, at best, as an advisory opinion. While this Court's "case or controversy" jurisdiction, U.S. Const. Art. III, § 2, counsels against such opinions, cf. *Griffith*, 479 U.S. at 322, state courts may feel no such constraints. See Durham, *The New Judicial Federalism and the Policy Making Role of State Supreme Courts*, 2 Emerging Issues in State Constitutional Law 219, 229 (1989) (noting absence of state court "case or controversy" restrictions). Accordingly, the Nevada court probably felt permitted, even obliged, to point out what it perceived as a flaw in the state "timely arraignment" statute.

Correspondingly, the Nevada court almost certainly perceived, correctly, that Powell had waived any Fourth Amendment argument under *McLaughlin*. In fact, *McLaughlin* was decided on May 13, 1991--before either of Powell's state appellate briefs were filed, on October 10, 1991 and February 3, 1992, respectively (R. 4997, 5122). Therefore, on appeal, Powell did not merely forfeit the issue

by default. Rather, properly chargeable with awareness of *McLaughlin*, he knowingly waived any appellate argument under it.

Had the Nevada court deemed it central to the appeal, one would expect its *McLaughlin* discussion to appear under a separate heading, apart from the "timely arraignment" violation actually argued by Powell. Further, the court would have specified its reason(s) for addressing an issue that had been waived. Perhaps those reasons would have included the "plain error" exception that Powell suggests to this Court (Pet. for Cert., at 2; Br. for Petitioner, at 16-18 & nn.).

The court did no such thing. Contrary to Powell's suggestion, the Nevada court never cast its *McLaughlin* discussion in terms of "error" at all--"plain" or otherwise. Nor did it find a *McLaughlin* "violation" (cf. Br. for Petitioner, at 4). Rather, the court merely expressed its view--albeit purporting to "hold," 838 P.2d at 924--that the NRS 171.178 "timely arraignment" statute ran afoul of *McLaughlin*. The court never held that it meant to lift the procedural bar of waiver--a bar that is an established component of Nevada law. E.g., NRS § 47.040 (1986) (Nevada "timely objection" rule, with "plain error" exception); NRS §§ 174.105, 174.125 (1992). In short, the Nevada court did nothing to make its discussion of *McLaughlin* dispositive of its ultimate judgment.

Accordingly, this Court lacks federal question jurisdiction, under 28 U.S.C. § 1257 (1988), to review the Nevada Supreme Court's judgment. This Court should therefore dismiss Powell's certiorari petition, as improvidently granted.

C. The Nevada Court's Judgment Can be Affirmed on the Ground that the Exclusionary Remedy Should Not be Applied Against Petitioner's Post-Arrest Statement.

If this Court retains jurisdiction, the Nevada Supreme Court's mistaken retroactivity analysis still does not require reversal of its judgment. A judgment can be affirmed upon alternative grounds not identified by the court that entered it; this can even be done by reversing an intermediate ruling made en route to the judgment. *Soldal v. Cook County*, ___ U.S. ___, 113 S. Ct. 538, 543 n.6 (1992). In this case, there are several alternative grounds upon which the Nevada court's judgment should be affirmed.

(1) Compliance with Then-Existing Law. This Court has stated that "a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (Br. for Petitioner, at 8). However, even if it is assumed that a *McLaughlin* forty-eight hour violation might require the exclusionary remedy and reversal in some cases, that remedy is not appropriate in this case.

Under the principle embodied in *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987), and *Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979), the exclusionary remedy does not apply to evidence obtained by law enforcement conduct that conforms to then-existing law. While Powell relegates this principle to a footnote (Br. for Petitioner, at 12 n.7), it provides the foremost ground for affirming the Nevada court's judgment.

In advancing this ground, *amici* indulge, as does Powell (Br. for Petitioner, at 6), the Nevada court's assumption that at the time of Powell's warrantless arrest, judicial probable cause determinations in Nevada were subject to the same time deadline as the "speedy arraignment" provision of NRS 171.178. See 838 P.2d at 924, J.A. 6. Powell's judicial probable cause determination was made well within that seventy-two hour deadline, excluding, as the statute permitted, the intervening weekend. *Id.*, J.A. 5.

Because they obtained a probable cause determination that was timely under their governing statute, and because that statute had not yet been ruled unconstitutional, Nevada authorities committed no error that justifies application of the exclusionary remedy. Statutes are presumptively valid, and law enforcement authorities are expected to follow them, "until and unless they are declared unconstitutional." *DeFillippo*, 443 U.S. at 37-38. The only "possible exception" to this principle is adherence to "a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.*; accord *Krull*, 480 U.S. at 349-50.

By no stretch of imagination could NRS 171.178 be deemed "grossly and flagrantly unconstitutional" at the time of Powell's 1989 arrest. In fact, both the statute and the actual timing of Powell's probable cause determination conformed to a pre-*McLaughlin* statement by this Court, suggesting that a delay of *five* days between a warrantless arrest and a judicial probable cause determination was permissible. See *Schall v. Martin*, 467 U.S. 253, 277 n. 28 (1984) (citing *Gerstein*, 420 U.S. at 124 n. 25). Further, in *Gerstein*, 420 U.S. at 123, this Court had "recognize[d] the desirability of flexibility and experimentation by the States"

in providing prompt probable cause determinations, and meeting other pretrial requirements, for warrantless arrestees.

NRS 171.178 certainly did not overextend the flexibility that this Court granted in *Gerstein*. Because Nevada authorities complied with the law as it then existed--eighteen months before the *McLaughlin* forty-eight hour rule was announced, they committed no "misconduct" that the exclusionary remedy should deter.

(2) No "Flagrant" Misconduct, or Causation. In *Brown v. Illinois*, 422 U.S. 590 (1975), this Court rejected a "but for" or "*per se*" analysis for application of the exclusionary remedy against a statement made after an improper arrest. 422 U.S. at 603. The correct analysis, the Court held, looks at the temporal proximity of the arrest and the statement, the presence or absence of intervening circumstances between the arrest and the statement, "and, *particularly*, the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (emphasis added). In this case, even if a *McLaughlin* violation was committed, as Powell insists (Br. for Petitioner, at 4), it would not, under *Brown*, justify suppression of his post-arrest statement.

The "temporal proximity" factor does not fit this case very well, because the *McLaughlin* forty-eight hour violation alleged by Powell was not a circumscribed event, like the illegal arrest in *Brown*. Rather, that post-arrest "violation" lasted about two days, until probable cause to arrest Powell was confirmed by the magistrate, and appears to have encompassed the time when Powell made the statement in question.

Again, however, there is no evidence that Powell was subjected to unusually coercive police conduct at any time during his post-arrest confinement. This gives rise to a significant "intervening circumstance" under *Brown*. Powell makes no claim that he misunderstood his "*Miranda*" warnings, given just before making his post-arrest statement. Accordingly, those warnings should have accomplished their purpose: dispelling the inherently "compelling atmosphere" in which the statement was made. See *Miranda v. Arizona*, 384 U.S. 436, 465 (1966). Therefore, on the facts of this case, Powell's waiver of "*Miranda*" rights was a powerful--perhaps conclusive--intervening circumstance between the alleged *McLaughlin* violation and his post-arrest statement. Cf. *Brown*, 422 U.S. at 603 (warnings alone may not dispel "taint" of Fourth Amendment misconduct).

The "purpose and flagrancy" factor, holding "particular" importance under *Brown*, weighs even more heavily against suppression of Powell's statement. There is no evidence that Nevada authorities, who had probable cause to arrest Powell in the first place, delayed the judicial probable cause determination beyond the not-yet-announced *McLaughlin* deadline with the purpose of thereby extracting a statement from Powell. That delay can hardly be viewed as "calculated to cause surprise, fright, and confusion," as this Court characterized the at-gunpoint arrest, unsupported by probable cause, that took place in *Brown*. 422 U.S. at 596, 606. And the Nevada authorities certainly cannot be faulted for failing to predict that long after Powell's arrest, they would be held to a new promptness standard for obtaining a post-arrest probable cause determination. Thus Powell's claim of a "flagrant" Fourth Amendment violation (Pet. for Cert., at 6) must fail.

In like fashion, this Court reversed a state court order to suppress an arrestee's statement in *New York v. Harris*, 495 U.S. 14 (1990), because it had not been caused by a preceding Fourth Amendment violation. While having probable cause, officers in *Harris* had violated the Fourth Amendment by entering the suspect's home, without consent, to make a warrantless arrest. *Id.* at 16-17 (citing *Payton v. New York*, 445 U.S. 573 (1980)). This Court held that the statement in question, made after the arrestee was removed to the police station and upon waiver of "*Miranda*" rights, was not "the fruit of having been arrested in the home rather than someplace else." *Id.* at 19.

Similarly, in this case, Powell's post-arrest statement to the Nevada police was not caused by the delay in his judicial probable cause determination. He had given a substantially identical, voluntary pre-arrest statement, in which he denied wrongdoing. There is no sign, had his post-arrest interview occurred within the later-announced *McLaughlin* deadline, that Powell would have passed on the opportunity to repeat that denial. In the terms of *Harris*, the statement in question was not the "fruit" of interviewing Powell on November 7, rather than on November 5.

(3) No Future Deterrence, Wasteful Cost. Perhaps Powell's vague prayer for relief reflects a desire to remand this case back to the Nevada courts, to decide whether application of the exclusionary remedy against his post-arrest statement is required. No such remand is appropriate. If Powell were granted suppression upon such remand, it would have no meaningful deterrent effect against *future* "forty-eight hour" *McLaughlin* violations--deterrence that is the prime purpose of the Fourth Amendment exclusionary remedy. *Stone v. Powell*, 428 U.S. 465, 492 (1976).

Amici believe that the *McLaughlin* rule, by itself, deters future violations. The rule gives a bright-line meaning to this Court's prior holding, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that the subject of a warrantless arrest must receive a "prompt" judicial probable cause determination. With a bright-line standard now in place, future "promptness" violations should be quite rare. Future violations will be further deterred by the mere prospect that when an arrestee is held beyond forty-eight hours without a probable cause ruling, the responsible authorities will be haled into court to explain themselves. *McLaughlin*, 111 S. Ct. at 1670. Suppressing Powell's statement, because of the long-past "violation" in this case, would not meaningfully enhance the built-in deterrence of *McLaughlin*.

Against a non-existent deterrent benefit, the cost of a remand would be excessive and, for Powell, probably futile. Despite Powell's protestations (Br. for Petitioner, at 3-4), no "finding" of a *McLaughlin* violation was made. In fact, if the November 3, 1989 date stamp on the "declaration of arrest" represents the time that the reviewing magistrate received notice of Powell's arrest, there would be no such violation--or at least not one attributable to law enforcement authorities. At most, there would be judicial delay in reviewing the arrest. The exclusionary remedy, aimed only at law enforcement misconduct, not judicial error, would therefore not apply. *United States v. Leon*, 468 U.S. 897, 916-17 (1984).

If law enforcement-caused delay were presumed, it would still be necessary to explore whether "bona fide" powerful reasons justified or excused the delay. *McLaughlin*, 111 S. Ct. at 1670 (delay past forty-eight hours only raises presumption of "prompt probable cause determination" violation). This would be a difficult, costly task, given the

years that have elapsed since the events in dispute. That cost would not be worth the non-existent benefit that would be achieved were a "48 hour" violation confirmed on remand. Cf. *Stone v. Powell*, 428 U.S. at 493.

Even if Powell did show that suppression was appropriate, it would seem only fair to re-examine, upon remand, the Nevada Supreme Court's unanalyzed, rather offhand assertion that the post-arrest statement in question was "clearly prejudicial." 838 P.2d at 924, J.A. 5. That assertion actually referred to both Powell's pre-arrest and post-arrest statements. Because the former statement was not subject to suppression, the admission of the substantially identical post-arrest statement was, in all probability, harmless beyond a reasonable doubt. See *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (erroneous failure to suppress evidence for Fourth Amendment violation can be harmless); *Chapman v. California*, 386 U.S. 18, 20-24 (1967).

In sum, under this Court's sound precedent and the particular circumstances of this case, the cost of suppressing Powell's post-arrest statement, or of finding the facts that might justify suppression, fails to justify the paltry deterrent effect that the exclusionary remedy might have upon future "forty-eight hour" violations. On this basis, the Nevada Supreme Court's judgment should be affirmed.

D. This Court Should Articulate a Two-Part, "Violation Plus Remedy" Pleading Rule for Fourth Amendment-Grounded Motions to Suppress Evidence.

The foregoing arguments for affirmance highlight an important Fourth Amendment principle: A criminal defendant, wishing to suppress probative evidence, cannot succeed by merely proving that the evidence was obtained in connection with some Fourth Amendment violation. Instead, suppression depends upon a showing that the exclusionary remedy--not itself a constitutional right--is appropriate under the circumstances of the case. See *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Leon*, 468 U.S. 897, 905-13 (1984). *Amici* endorse this principle.

All too often, however, this principle seems lost upon both litigants and the courts that adjudicate Fourth Amendment issues. In this case, for example, the Nevada court appears to have assumed, without analysis, that the exclusionary remedy would necessarily attend any "forty-eight hour" violation under *McLaughlin*. See 838 P.2d at 924 n.1, J.A. 6. Powell apparently wishes to promote this assumption of "automatic suppression" whenever a Fourth Amendment violation is shown.

This Court should re-articulate, in no uncertain terms, that this assumption is false. A two-part, "violation plus remedy" showing is required. This is, in essence, a rule of Fourth Amendment pleading.

Properly observed, this rule has the desired effect of targeting, for the exclusionary remedy, the kind of intentional Fourth Amendment violations against which all citizens

should be protected. After all, *Brown v. Illinois*, 422 U.S. 590 (1975), teaches that "flagrant" violations are the proper target of that remedy. *Mapp v. Ohio*, where the remedy was held applicable to the states, similarly involved deliberate disregard of Fourth Amendment rights. 367 U.S. 643, 644-45 (1961). No such deliberate violation occurred in this case.

CONCLUSION

The state court judgment at bar rested entirely upon state law grounds, and is not subject to review by this Court. Further, there are powerful alternative reasons to affirm the Nevada Supreme Court's judgment. Accordingly, by dismissal of certiorari or by affirmance, that judgment should be left intact.

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